

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

O'BRIEN & ASSOCIATES, INC.

and

Case 13-CA-41013

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL UNION NO. 150, AFL-CIO

Richard S. Andrews, Esq. and Lisa Friedheim-Weis, Esq.
for the General Counsel.

John F. Bowen, Esq. and Thomas R. Revnew, Esq.
(*Seaton, Beck, Peters, Bowen & Feuss P.A.*), of Edina,
Minnesota, for the Respondent.

Charles R. Kiser, Esq., of Countryside, Illinois, for the
Charging Party.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: The charge was filed by the International Union of Operating Engineers, Local Union 150, AFL-CIO (Union) against O'Brien & Associates, Inc. (Respondent or O'Brien) on May 1, 2003.¹ The charge was amended on August 14 and on August 20. As here pertinent, a first amended complaint (complaint) was issued on August 26 alleging that the Respondent violated (1) Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by (a) threatening employees that if they selected the Union, the Respondent would subcontract its drilling work, do away with overtime, close its operation, and do other unspecified things, (b) interrogating employees about their union activities and participation in the National Labor Relations Board's (Board) investigation of the instant case, (c) creating the impression among its employees that their union activities were under surveillance, and (d) informing its employees that it would be futile for them to select the Union as their collective bargaining representative, (2) Section 8(a)(3) and (1) of the Act by discharging its employees Jason Cooley and Joe Herrick because they joined, supported or assisted the Union, and (3) Section 8(a)(1) and (4) of the Act by discharging Herrick because he gave testimony to the Board in the form of an affidavit. The complaint also alleges that a majority of the employees in the unit,² by union authorization cards designated and selected the Union as their

¹ All dates are in 2003 unless indicated otherwise.

² The unit consists of the following:

All full-time and regular part-time drillers, driller's helpers, and field technicians employed by the Employer at its facility currently located at 1235 E. Davis Street, Arlington Heights, Illinois; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The parties stipulated that from January 1, and at all times material herein the following 14 employees were employed by the Respondent in the involved unit as drillers, drillers' helpers, and technicians: Ahmed Almousawi, Marc Bassi, Ron Bell, Dave Broadway, Chris Campbell,

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representative for the purposes of collective bargaining with the Respondent, and the complaint seeks a bargaining order alleging that the above-described violations are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employee sentiments have been expressed by authorization cards. The Respondent denies violating the Act as alleged, and it argues that a bargaining order is not warranted.

A trial was held in this matter on October 8, 9, 10, 27, 28, 29, and 30. On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsels for General Counsel, the Charging Party, and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with an office and place of business in Arlington Heights, has been engaged in the business of providing geotechnical engineering services, including field and lab-based engineering testing, for commercial and residential buildings, roads, bridges, and related structures. The Respondent services the Chicago Metropolitan area and occasionally it has jobs in Wisconsin, Indiana, and Iowa. During the 12 months before the issuance of the complaint herein, the Respondent admits that, in conducting its business operations, it performed services valued in excess of \$50,000 for various enterprises located in states other than the State of Illinois and for other enterprises located within the State of Illinois that are directly engaged in interstate commerce. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

In February 2002, Cooley, who worked as a driller for the Respondent, met at the Union's offices with union organizer Stan Simrayh to discuss organizing the Respondent's employees. Respondent's employees Tim Kowalski and Mandat were also present at this meeting.

Herrick testified that in early February 2002 he attended a union meeting and signed a union authorization card; and that the organizing drive conducted at O'Brien died down that year.

Mandat, who worked for the Respondent for two years and was still employed by the Respondent as a driller's helper at the time he testified at the trial herein, testified that Herrick participated in the February 2002 union meeting by telephone; that he signed a union authorization card before this meeting; that in February and March 2002 he talked with other

Cooley, Herrick, Rich Huffman, Dan Mandat, Panjek Patel, Charlie Patel, Brian Panozzo, Vipul Ray, and Bob Scoma. The parties also stipulated that the status of John Eisenhower as a unit employee is in question in that Respondent asserts that Eisenhower is in the unit and Counsels for the General Counsel and the Charging Party assert that Eisenhower is not in the unit. General Counsel's Exhibit 27(b).

³ The Respondent's unopposed motion to correct the transcript, dated December 16, is granted and received in evidence as Respondent's Exhibit 9.

helpers and drillers, showing them a contract and asking them to sign union authorization cards; and that the 2002 organizing drive stopped after March 2002.

During February, March, and April, 2002 According to the testimony of Cooley, he showed copies of a proposed contract in the industry to employees, he handed out authorization cards, and he spoke about the benefits of the Union. After this period the Union organizing drive slowed down. On cross-examination Cooley testified that in February 2002 he was one of the lead organizers; that between February and April 2002 he did not have discussions about the Union with Josephine O'Brien, who is the President of the Respondent and owns 98 percent of the company, or Joe Pilipiszyn, who is the manager of the technicians and has the title of Quality Assurance Manager; that two or three times between February and April 2002 he heard Josephine O'Brien yell that she would shut down the drilling department, she would sell all of the rigs before she would allow the Union to take over; and that this alleged unlawful conduct is not included in his May 12, 2003 affidavit to the Board. On redirect Cooley testified that Josephine O'Brien was not screaming at the top of her lungs but she was talking louder than normal which is what he meant when he originally testified that she was yelling; and that his affidavit to the Board contains a reference to Josephine O'Brien threatening to shut down the drilling department.

When called by the Respondent, Josephine O'Brien testified that during the calendar year 2002 she did not have any knowledge of union activity at O'Brien; that she heard Cooley's testimony about what she allegedly said in February 2002, namely, she would not allow the Union to come in, and she did not make a comment like that; that she never said in February 2002 that she would close the doors if the Union came in; that between February 2002 and April 30, 2002 she never saw union bumper stickers in O'Brien's parking lot and she never saw O'Brien employees wearing union hats; and that during calendar year 2002 she had throat cancer and was undergoing radiation therapy for eight weeks.

Cooley testified that in March 2002 he overheard Josephine O'Brien speak about the Union telling Eisenhut, who is the Head Lab Technician, "I will not allow them in. I would close the doors before they'd come in." (transcript page 64) On cross-examination Cooley testified that Pilipiszyn was in the laboratory with Eisenhut and Josephine O'Brien when she made this statement; that Josephine O'Brien did not begin her chemotherapy for throat cancer until the middle or the end of 2002; and that this incident is covered in his May 12, 2003 affidavit to the Board.

When called by Counsel for General Counsel, Josephine O'Brien testified that she sees Eisenhut in the morning when she gets coffee in the lab area. When called by the Respondent, Josephine O'Brien testified that Eisenhut manages the lab; that when technicians work in the lab Eisenhut will tell them what tests to run; that Eisenhut does not order them to do something in that the technicians usually come up to him asking if there is something they can do; that Eisenhut does go out into the field 20 to 25 percent of the time but he is mostly in the lab; that no employees report to Eisenhut, and he does not discipline or manage employees, or participate in management decisions; that Eisenhut punches a time clock; and that Eisenhut calibrates certain equipment. On cross-examination Josephine O'Brien testified that Eisenhut spends about 20 percent of his time in the field and the rest of his time in the office.

When called by Counsel for General Counsel, James Wandell, the Project Manager of the Respondent, testified that Eisenhut is the Lab Manager.

Pilipiszyn testified that Eisenhut reports to him on some specified projects; that Eisenhut is responsible for calibration of all of O'Brien's equipment that is used for field testing, and he

conducts some tests in the lab; that he occasionally (two to four times a month) sends Eisenhut out into the field to test structural steel and welds; that no employees report to Eisenhut; and that Eisenhut has no responsibility for disciplining employees, reviewing employee work performance, or determining employee compensation.

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When called by the Respondent, Wandell testified that between January and April 2002 he did not see any O'Brien employee wearing a union hat or a union button, and he was not aware of any union organizing activity by the Respondent's employees.⁴

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In January 2003 Cooley drove a K-5 Blazer he borrowed from a friend to work for about three weeks. The vehicle had two Local 150 Union stickers in the back window. Cooley testified that he parked the vehicle in the first parking space closest to Respondent's building whenever the space was available; that his Drilling Supervisor, Wandell, asked him what was up with the truck, and he explained to Wandell that his car was not running and he borrowed a buddy's truck; that Wandell asked him to park the truck somewhere else, he asked Wandell if there was a problem with the truck, and Wandell said no, just park it somewhere else; and that subsequently he continued to park the truck in the first space as often as he could. On cross-examination Cooley testified that when he was having trouble with his car Josephine O'Brien would allow him to take a company vehicle home; that the two Union stickers were 3 inches by 10 inches; that he knew that the truck with the Union stickers "would piss Jim [Wandell] off" (transcript page 212); that neither Wandell nor any other supervisor or manager said anything about the Union stickers on the Blazer; that when he parked his own truck, which was bigger than the borrowed Blazer, in the same first parking space closest to Respondent's building Wandell did not ask him to move it; that there are between 20 and 30 parking spaces in the Respondent's parking lot; that when Wandell asked about the Blazer he told Wandell that the owner of the Blazer is a Local 150 member; and that he said that he did not have a problem with Local 150 when Wandell asked about the Blazer.

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Mandat testified that in January 2003 Cooley's vehicles were not running and he borrowed one of his friend's truck and drove it to work; that Cooley showed him that the borrowed vehicle had Local 150 union stickers on it; and that Cooley told him that he, Cooley, tried to park it as close to Wandell's office window as he could. On cross-examination Mandat testified that he was present when Wandell asked Cooley to park the truck somewhere else but he did not know why Wandell asked Cooley to park the truck somewhere else, and he did not know if Wandell saw the Local 150 stickers.

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When called by Counsel for General Counsel, Wandell testified that he never asked Cooley not to park "[h]is personal vehicle" (transcript page 984) in a parking place near O'Brien's facility.

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When called by the Respondent, Wandell testified that he never had a conversation with Cooley about the way Cooley parked his truck in the O'Brien parking lot; that he never saw a truck in the parking lot "such [that] the bed was toward the building with Local 150 stickers in the window" (transcript page 1313); that in early 2002 he asked Huffman to move his truck so that

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⁴ Wandell testified about an incident sometime in 2002 when it was cold and he visited a drill rig at a jobsite on Wacker Drive and found two strangers near the rig. According to Wandell's testimony, he was later told by the driller involved, apparently Richard Huffman, that the two individuals were union representatives. On cross-examination Wandell testified that at least one of the individuals he asked to get a safe distance away from the drilling rig may have introduced and identified himself but he was not interested.

an obscene bumper sticker he had on the vehicle would not face a day care next door; and that from his office he could not see the first parking space by the building coming in off the street because part of the building blocks his view.

5 On January 21 Cooley was involved in an automobile accident while driving his parents' car.

10 Herrick testified that somewhere toward the end of January 2003 or the beginning of February 2003 when the Union "started kicking in real hard" (transcript page 470) he went to the lab one morning to get coffee and on his way into the lab he overheard Josephine O'Brien tell Pilipiszyn "that if the union was to come, she'd end up shutting down the subcontracting" (transcript page 471); and that they stopped talking as soon as he walked through the lab. On cross-examination Herrick testified that Josephine O'Brien and Pilipiszyn started talking about other things when he entered the room and said "good morning" but he was not paying
15 attention.

20 When called by the Respondent, Josephine O'Brien testified that she never said to anybody that she would shut down the drilling department and subcontract it if the Union would come in.

25 Pilipiszyn testified that he never heard Josephine O'Brien say (a) she was going to shut down the drilling department because of the Union, (b) she was going to subcontract the work within the drilling department because of the Union, (c) she was going to shut down his department because of the Union, or (d) she was going to subcontract the work within his department because of he Union.

30 When called by the Respondent, Josephine O'Brien testified that there are occasions when the Respondent subcontracts either drilling work or field testing work to three named companies; that she believes that the employees at two of the named subcontractors are represented by the Union; that since she received unfair labor practice charges from the Board she has subcontracted work to these companies; that charges were filed with the Board by Respondent's employees Kowalski, Herrick and Jason Cooley; that the first that she became aware of the union organizing campaign was in late January 2003 when the Respondent was kicked off a job; and that she first became aware of the physical presence of the Union on
35 January 29 when four cars were lined up on the street outside of O'Brien's office, which cars followed the Respondent's vehicles and employees as they left the facility.

40 On January 28 or 29, according to the testimony of Wandell, O'Brien left the U.S. 41 Project because the Respondent was told that its presence as a non-union drilling company was disrupting all of the other work going on. Wandell further testified that for the remainder of January, and in February, and March he saw cars, which were parked outside O'Brien's facility, follow O'Brien vehicles as they left the facility to go to jobsites.

45 In February 2003, according to the testimony of Cooley, the Union's organizing drive started up again. Herrick testified that the union organizing drive started up again in the beginning of January 2003. Cooley was on medical leave as a result of being in the above-described automobile accident. Mandat testified that beginning in February 2003 he talked to all the drillers and helpers, showed them the contracts, told them about the benefits of being in the Union, and asked employees to sign a union authorization card; and that he spoke to the
50 employees about the Union when they were in the garage in the morning, at the gas station, or on jobsites. Mandat further testified that Respondent's employees Cooley and Herrick also engaged in union organizing activities until they were terminated in April 2003; and that

Kowalski also engaged in union organizing activity.

On February 3 Cooley telephoned Josephine O'Brien to discuss his situation with respect to sick days, vacation days, and a personal day so that he could receive a paycheck while he was out recuperating from his automobile accident. Cooley testified that during this conversation he commented about the fact that the Union had been around, O'Brien said yes, and then she asked him if he was going to the meeting on Thursday; that he told O'Brien that he had heard about the meeting, if he could get his hands on a vehicle, he would like to go to get some information, he wanted to help his family, and improve his situation; and that O'Brien said that was his choice. On cross-examination Cooley testified that during this telephone conversation with Josephine O'Brien she allowed him to take 10 vacation days, five sick days and a personal day so that he would have income while he was recuperating from the automobile accident, and she explained to him how he could take a loan on his 401(k) plan so that he could pay his home mortgage and other bills. On redirect Cooley testified that Josephine O'Brien did not give him any additional benefits other than what he was entitled to as an employee.

When called by the Respondent, Josephine O'Brien testified, with respect to Cooley's allegation that she asked him if he was going to the union meeting, that she doubted that she knew there was a union meeting, she did not ask him, and she never asked anybody that.

Broadway, who was called as a witness by the Respondent (subpoenaed), testified that "the Union approached me to go to Union meetings, which I did inform the office that Union meetings were taking place" (transcript page 1264); that he brought up the union meetings in general conversation at coffee at O'Brien in the morning; that he said I hear there's going to be a Union meeting or I heard there was a union meeting; that usually the management was there or just employees; that on some occasions Pilipiszyn was there; and that on some occasions Josephine O'Brien has coffee the first thing in the morning. When asked if Josephine O'Brien was present during these discussions Broadway testified "[n]o, I believe she was present when - ." (transcript page 1276) Broadway did not finish his answer and there was no follow-up question.

When called by Counsel for General Counsel, Josephine O'Brien testified that as demonstrated by General Counsel's Exhibit 9, around February 4 she was concerned about Local 150 representatives following her employees to jobsites. When called by Respondent, Josephine O'Brien testified that with respect to General Counsel's Exhibit 9, which states, as here pertinent, "Under no circumstances may CTE allow O'Brien to return to US 41 geotechnical work until all of the following occur: 1-O'Brien attempts to resolve their differences with the union...." that she had no differences with the Union that she knew of.

On February 6 Mandat, according to his testimony, had a conversation with Josephine O'Brien in her office when he went there to pick up his paycheck. Mandat testified that the conversation occurred in the late afternoon, and just he and O'Brien were in the office; that O'Brien asked him if the Local 150 guys had been following him and other O'Brien employees or said anything to him and other O'Brien employees; that he told O'Brien that the Local 150 representatives just followed them and the representatives just sat in their cars; that he asked her why they just started following O'Brien employees all of a sudden and she said that it was because of a "ULP" that Kowalski filed against her; that she showed him the charge that Kowalski had filed with the Board, General Counsel's Exhibit 5⁵; that he asked her what she

⁵ The first amended charge was received as General Counsel's Exhibit 6. One of the
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was going to do about it and she told him that she had the evidence and she was going to let the lawyers handle it; that the Union representatives had been following O'Brien employees to jobsites for about 1 week; that during that week or so he overheard Josephine O'Brien say that if O'Brien employees could lose the Union, to lose them and not let them follow O'Brien employees to jobsites; and that Pilipiszyn and possibly Head Driller Huffman were present.

On Thursday February 6 Cooley went to the Union meeting. His driller's helper, Herrick, also attended the meeting. Cooley testified that they discussed how the organizing would go and he signed his second union authorization card, General Counsel's Exhibit 11, which is dated February 6; and that he saw Jim Myers, who is a union organizer, also signed his card as the witness. On cross-examination Cooley testified that at this meeting they discussed what he was going to tell other employees, and what he was going to do - if they would help him out - if Josephine O'Brien shut down; that the Union representatives told him that they would help him find a job if Josephine O'Brien shut down but that she could not shut down because of the organizing drive; that the Union representatives told him that they needed a majority of cards for a vote; and that he handed out Union authorization cards and talked to Respondent's employees telling them that the card authorized the Union to represent them as their bargaining agent, and if the Union got a majority of cards, there would be a vote whether or not the Union would represent O'Brien's employees.

Herrick testified that at the beginning of February when his car would not start at the end of the workday he asked Wandell, who was alone in his office, if he could borrow one of the company vehicles to drive home; that Wandell asked him if he was going to the union meeting; that he said "no" because he was not sure that management was supposed to know about the union meeting; and that Wandell said that he could borrow the company Blazer as long as he was not going to the union meeting. On cross-examination Herrick testified that his May 13 affidavit to the Board indicates that at the end of February 2003 his work vehicle broke down. On redirect Herrick testified that this conversation with Wandell occurred on February 6 and the affidavit was incorrect in indicating that it occurred at the end of February 2003.

When called by the Respondent, Wandell testified that he did not ask Herrick if he was going to a union meeting, he never told Herrick that he could not use a company vehicle to go to a union meeting, and he never conditioned allowing Herrick to use a company vehicle on his not going to a union meeting.

Herrick attended the February 6 union meeting, and he signed a union authorization card which is dated February 6, General Counsel's Exhibit 12. The witness line of the card was signed by Myers. On cross-examination Herrick testified that he was with Cooley when union representatives were talking about authorization cards; that nothing was said about an election or a vote at that time; that the Union representatives told him and Cooley to describe the contracts to employees to get them to sign union authorization cards; that they were told that they needed to get a majority of the employees to sign union authorization cards but they were not told why at the time; that a couple of days after February 6 a Union representative told him that they had to get a majority of the employees to sign union authorization cards in order to get an election; and that he told employees that they needed to get a certain number of cards to get a vote.⁶

attorneys for the Respondent pointed out, without contradiction, that the charge was dismissed by the Board and the dismissal was affirmed on appeal.

⁶ The employees he told this to were Scoma, Huffman, Bassi, Campbell, Bell, Pankaj, Eisenhut, Panozzo, and Benny Parker, who left O'Brien to work for GEO Services.

Herrick testified that he discussed the Union with his coworkers in the lab, the hallway, in Wandell's office,⁷ the garage, the driveway, in vehicles on the way to jobsites, and at the gas station; that he discussed the Union mainly in the mornings but also throughout the day
 5 whenever it came up when the employees were driving or working; and that Cooley and Mandat were also involved in organizing activity.

On February 19, according to the testimony of Herrick, he had a conversation with Josephine O'Brien in her office about the Union. Herrick testified that just the two of them were
 10 present; that he was in Josephine O'Brien's office to pick up his paycheck; that she asked him if the Union was still following the employees; that he answered "yes"; that she then said that "she had seen this plenty of times before with her other companies ... they'll try to get themselves in. And when they do get in ... it hurts the company and the employees in the long run, ... they'll make more money but by the time they pay the dues, there will be less work going through
 15 them, you actually end up making less money" (transcript page 472); and that she referred to the Union as "goons" (transcript page 472). On cross-examination Herrick testified that to his knowledge at this point in time Josephine O'Brien did not know that he was a union activist.

When called by the Respondent, Josephine O'Brien testified that she never asked
 20 employees in calendar year 2003 whether members of Local 150 had followed them in their rigs or vehicles; that she could see the Union representatives following the O'Brien vehicles every morning if she looked out the window; that she never told employees not to talk to Union representatives; that she did not recall any discussion with Herrick with regard to (a) whether the Union was following him, (b) the Union being a bunch of liars, (c) the Union would hurt the
 25 company and the employees in the long run, and (d) him making more money with the Union but making less with union dues; and that she never discussed the Union with Herrick.

On February 21, according to his testimony, Herrick telephoned Wandell about 6 a.m. and told him that he was not going to be able to work that day because he was going to the
 30 Labor Board to give a statement. Herrick testified that Wandell said "okay"; and that he did go the Board that day.

When called by the Respondent, Wandell was asked by one of the Respondent's attorneys if on February 1 he recalled a conversation with Herrick on the telephone where
 35 Herrick told him that he was going to the National Labor Relations Board to provide a statement. Counsel for General Counsel pointed out that that was not Herrick's testimony. Wandell answered that he did not have that conversation with Herrick.

On cross-examination when she was called by the Respondent, Josephine O'Brien
 40 testified that she received a copy of a Board charge dated February 25⁸ in which it is alleged, among other things that Respondent discriminated against Herrick by denying him Saturday work and by denying him drilling opportunities because he supported Local 150 and engaged in other protected, concerted activity.

Wandell testified that in February 2003 he followed a driller, Campbell, to a job in
 45 Evanston, Illinois; that it was his understanding that they were followed to the jobsite; and that

⁷ Herrick testified in "Jim's office." (transcript page 468) The only O'Brien office described on the record herein which is occupied by a "Jim" is Wandell's.

⁸ General Counsel's Exhibit 6. While the "DECLARATION" portion of the charge is dated
 50 February 25 there is no date in the box for date filed.

the superintendent at the jobsite told him that O'Brien's presence at the jobsite would disrupt his operation in that if Local 150 posted placards or pickets, the other unions on the site would honor it.⁹

5 Cooley returned to work on March 3 from the above-described automobile accident.

Cooley testified that starting in March 2003 he talked to employees in Respondent's garage and parking lot about the benefits of a union, and he handed out union authorization cards; that he spoke with the following drilling and technical personnel about the Union: Bassi, 10 Panozzo, Bell, Campbell, Scoma, Huffman, Pinky, and Charlie; that when he spoke with the employees in the garage about the Union, Eisenhut or occasionally the manager of the technicians, Pilipiszyn, would walk through the garage; that he continued talking to the employees about the Union up to the time of his termination at the end of April 2003; that Herrick and Mandat, who is a driller's helper, were also involved in union organizing activities; 15 and that Herrick was referred to by Eisenhut as "Union Joe" in the presence of managers or supervisors (transcript page 79). On cross-examination Cooley testified that named drillers and technicians, including Eisenhut and Wess from upstairs, used the terms "Union Joe."

Panozzo, a field tech who was called by the Respondent and who is not required to show up in the office in the morning, testified that he never heard anyone refer to Herrick as "Union Joe" and he never heard the reference "Union Joe." On cross-examination Panozzo testified that if he is in the office working he will get coffee in the lab in the morning; that he reported to work out in the field directly on a consistent day in day out basis instead of coming into the office in January, February, March, and April 2003, and at the end of the day he would go home; that occasionally he would stop at the office to drop off his reports and he would do this early in the morning before his morning job or at the end of the day; that if a driller was using the phrase "Union Joe" at the office in January, February, March or April he would not have heard it because he was not there; and that on the morning he testified at the trial herein, 25 October 29, he discussed his testimony in the waiting room with Bell, Pinky Patel, Charlie Patel, and Huffman. 30

Huffman, who was called by the Respondent, testified that he heard the name "Union Joe" around the shop once or twice, he did not know who said it, but it refers to Joe Herrick; that he never used the term "Union Joe," and he never heard a manager or Wandell, Pilipiszyn, or Josephine O'Brien use the term; and that when he heard the term "Union Joe" he did not believe that any managers were present. On cross-examination Huffman testified that Panozzo did not discuss his testimony with him; and that there could have been people standing around when he heard the name "Union Joe," and "I am not positive management wasn't around, no" (transcript page 1070). 35

40 When called by the Respondent, Wandell testified that he never heard of anyone at O'Brien called "Union Joe" or referred to as "Union Joe."

Herrick testified that during the first week of March 2003 he and Wandell were in Wandell's office; that he was wearing a black and yellow stocking cap that said Local 150 Operation Engineers on it; that Wandell looked at the hat and asked him why he was for the Union; that he then told Wandell that he "signed a union [authorization] card because ... [he] 45

50 ⁹ Wandell also testified that a union representative took his picture and they took pictures of O'Brien employees. On cross-examination Wandell testified that O'Brien took pictures of the union representatives.

was tired of how unfair everything was ran [sic] around there and the wages and raise that ... [he] was receiving" (transcript page 475); and that Cooley and Mandat also wore union hats the same week that he wore his union hat. On cross-examination Herrick testified that this occurred in March, the middle of March 2003; that Wandell did not ask him about his union hat during the week he, Cooley, and Mandat wore union hats but rather Wandell's inquiry was at a different time; and that one or two weeks after Wandell commented about his union hat, he, Cooley, and Mandat wore union hats during the same week. Wandell testified that he never saw Herrick wear any union paraphernalia.

When called by the Respondent, Wandell testified that he never saw Herrick wearing a union hat between January and April 2003; and that he never asked Herrick why he was for the Union.

For one week in March 2003, according to his testimony, Cooley wore a Union hat at work. Cooley testified that the Union hat was a baseball cap with a union logo on the front; that Mandat and Herrick also wore Union hats at work that same week; that at the end of the week Wandell asked him "what's up with the hat" (transcript page 76); that he told Wandell that it was a replacement hat for the one he lost in his January 2003 accident; that Wandell asked him why he could not go and buy another hat; that he told Wandell that he would if Wandell gave him the money; that Mandat was with him and Wandell asked him what was going on with the hat he was wearing; that Mandat told Wandell that it was just a hat; and that he, Herrick, and Mandat stopped wearing their union hats at work after that. On cross-examination Cooley testified that he had the conversation with Wandell about the Union hat at the end of the week during which he was wearing the hat.

Mandat testified that he wore a union hat for a week with Cooley and Herrick; and that Josephine O'Brien and Pilipiszyn saw him wearing the union hat but O'Brien did not say anything. Mandat also testified that when Wandell saw the union hat he was wearing, Wandell said "what the hell are you wearing," and when Wandell saw that Cooley was also wearing a union hat he said "What you too" and Cooley said it was just a hat, he lost his hat in an accident, the hat he was wearing was a free hat, and he was going to wear it; that Wandell's tone was angry; and that he, Cooley, and Herrick stopped wearing union hats after this conversation.

When called by the Respondent, Josephine O'Brien testified that she did not recall an incident in the lab where she saw Mandat wearing a union hat.

Pilipiszyn testified that he has never seen Mandat wearing a union hat or union paraphernalia.

When called by the Respondent, Wandell testified that he never saw Mandat wearing a union hat; and that he did not recall a conversation in his office where he said to Mandat "why the hell are you wearing that hat" (transcript page 1310); that he did have a discussion with Cooley regarding a union hat; that Cooley came into his office at the end of the day wearing a union hat and he asked Cooley "what are you wearing that for" (transcript page 1317); that Cooley said "it's the only hat I got" and he told Cooley "gosh, I could find you another hat" (transcript page 1317); that no one else was present in the room during this discussion and that was the end of the discussion; and that he did not instruct Cooley not to wear the hat.

Huffman, who was called by the Respondent, testified on cross-examination that from what he saw, Cooley and Herrick had been involved in the union organizing campaign; that he could not say that he ever saw Herrick wear a union hat in the shop, and he was not sure if Herrick wore a union hat; that he gave a signed affidavit, dated March 21, 2003, to the Board;

that, after reading his affidavit on the witness stand, “[I]t said that I have [seen Herrick wearing a union hat at O’Brien & Associates] but I’m not positive. I can say that I’m not positive that it was a union hat or not” (transcript page 1083); and that the affidavit reads “I saw Joe Herrick wear a Local 150 hat one time at work” (transcript page 1083). On redirect Huffman testified “just the way I explained it ... [the Board agent] might have wrote it down wrong, yes” (transcript page 1085). On recross Huffman testified that before he signed the affidavit he read that portion where it states I state under penalty of perjury that the foregoing is true and correct.

Pilipiszyn testified that he never saw Herrick or Cooley wearing a union hat or any Union paraphernalia.

One day in March, 2003 Cooley and Herrick went to Josephine O’Brien’s office to get their paychecks since they were not by the time clock. Cooley testified that O’Brien asked Herrick if he filed a complaint against her and Herrick said that he did; that he left the office and waited about 10 feet away for Herrick; and that he overheard O’Brien tell Herrick that he was “full of shit” in that on the one Saturday he was on vacation and he had missed Saturdays, and Herrick said that he was not on vacation on the one Saturday, why would he miss a day when he had the option to work and he had requested to work that day. On cross-examination Cooley testified that he and Herrick rode together and he was waiting for Herrick so that they could leave; and that this conversation occurred after they had finished work that day.

Herrick testified that during the first or second week of March he went to Josephine O’Brien’s office with Cooley to pick up their paychecks; that O’Brien asked him if he went to the Labor Board; that he told her that he had; that O’Brien asked him “if ... [he] put any words against Jim [Wandell] and Saturdays and what’s going on in the company” (transcript page 478); that when he responded yes she told him that he was “full of shit and whatever the union is ... trying to persuade you with, they’re lying” (transcript page 478); and that O’Brien asked him if he signed a union card, and he told her that he had. On cross-examination Herrick testified that on Monday February 17 and Wednesday February 19 he told Wandell that he wanted to work overtime on Saturday February 22; that Wandell told him on February 29 that there was no Saturday overtime; that on Thursday February 20 he went to a doctor regarding the shoulder he hurt on January 27; that on Friday February 21 he told Wandell that he was going to the Labor Board; that Cooley did not walk out of the office while he continued to talk to O’Brien; and that at this time he was actively trying to organize the Respondent’s employees. On redirect Herrick testified that General Counsel’s Exhibit 41 is his time card for the week ending February 23; that he took a personal day for February 21 and he wrote “no pay” for February 20 when he went to see the doctor about his shoulder because he did not want to use his sick time; and that when he spoke with O’Brien he was leaning against the door jamb into her office and Cooley was on the other side of the door jamb opposite him.

When called by the Respondent, Josephine O’Brien testified that she had heard people around the office saying that Herrick had filed a grievance against her and she told Herrick

I heard that you filed with the union against me, which is the way I would, that’s what I said. I thought that he did file with the union.

And he said I didn’t file against you. I filed it against Jim [Wandell]. And I asked him, oh, what for? And he said because he wouldn’t give me overtime. And that was the end of the discussion. I went, I, I talked to Jim about it after. I wanted to see what was the complaint. [Transcript pages 1118 and 1119]

Josephine O’Brien further testified that she did not recall whether anyone else was present

during this conversation; that what she meant to say was that Herrick said that it was about Saturday work; that she did not tell Herrick that he was “full of shit” during this conversation; and that she did not call the Union liars. On cross-examination Josephine O’Brien testified that she told Herrick “I heard you filed a charge against me, [a]nd he said, no I didn’t, I filed against ... [Wandell]” (transcript page 1192); and that she told Herrick that that was really against her and she asked Herrick about what. On redirect Josephine O’Brien testified, when asked if she used the word “charge” that she thought that she used “grievance” but she might have said “charge.”

According to Herrick’s testimony, one morning in the middle of March 2003 when he was wearing a union hat in the lab to get coffee, lab technician Eisenhut started calling him “Union Joe” in the presence of Josephine O’Brien and Pilipiszyn. On cross-examination Herrick testified that he never heard a manager call him “Union Joe”; and that when Eisenhut first called him “Union Joe” in the lab, he, Herrick, was well known as a Union organizer, Pilipiszyn probably knew it and Josephine O’Brien knew it.

When called by the Respondent, Josephine O’Brien testified that she never heard the term “Union Joe” at O’Brien & Associates. As noted above, Pilipiszyn testified that he never saw Herrick wearing a union hat.

Mandat testified that he believed in March 2003 he gave Herrick the nickname “Union Joe”; that everybody called Herrick “Union Joe”; that all of the employees, except Eisenhut, used the name “Union Joe” in a kidding but positive manner; and that Herrick was called “Union Joe” in the field, in the garage, and in the hallway outside Wandell’s office.

Broadway, who was called by the Respondent (subpoenaed), testified that he has never heard anyone referred to as “Union Joe” by management; that he was not around the office that much but he believed he heard “Union Joe” in passing and it refers to a former employee of the Respondent; that he just heard drilling personnel say “Union Joe”; and that he did not hear Cooley or Mandat say “Union Joe.” On cross-examination Broadway testified that he is in the field 90 to 95 percent of his time.

Herrick testified that around March 2003 and after that he spoke with John Eisenhut about the Union; that these conversations occurred in the garage, the lab, and the hallway, among other places; that there were other employees present; that Eisenhut referred to the Union as the organized mafia or goons,¹⁰ and said that the employees would have to pay \$300 in dues; that he told Eisenhut the employees would not have to pay \$300 but rather the employees would pay \$30 a month and the employees would be getting paid more money in the long run and retirement would be better; and that when he and Eisenhut had these types of conversations he recalled that Wandell was present.¹¹ On cross-examination Herrick testified that Wandell was present one time when Eisenhut made these comments but he did not know whether Wandell, who was 2 to 4 feet away, heard the comments.

When called by the Respondent, Wandell testified that in March 2003 he did not see Cooley and Herrick speaking in O’Brien’s garage to Panozzo and Eisenhut.

Mandat, who is a driller’s helper, testified that Wandell told him that employee Bassi,

¹⁰ Mandat testified that he heard Eisenhut call the Union representatives goons, and say that they were like the mafia.

¹¹ The question asked was whether he recalled whether a member of management was ever there during these conversations.

who was the driller Mandat worked with, had been late too many times, and Bassi was suspended for 4 days in March 2003; that he worked with Bassi after he returned from his suspension, and Bassi still came to work late; that when he testified at the trial herein, Bassi was still employed by the Respondent; and that at the end of 2002 he saw a memorandum posted on Wandell's door which indicated that being late would not be tolerated anymore and something about an employee would be terminated after being late two times.

At the end of March 2003 or the beginning of April 2003 Cooley, according to his testimony, had a second conversation with Josephine O'Brien about the Union. Cooley testified that the conversation took place in her office, no one else was present, he told her that he had signed a union authorization card since he wanted to improve himself and his family, and she said

"well that's good. ... I can't afford to fight the Union. STS has spent a lot of money trying to fight them. ... if the Union comes in, this company will be a completely different company. ... we'll be cut, strictly no overtime, forty hours a week.... ...you won't have the same benefits that you have now and luxuries that you have now" (transcript pages 81 and 82)

On cross-examination Cooley testified that he volunteered to Josephine O'Brien that he had signed a union authorization card, he had no problem with the Union, and he was trying to better his family; that Josephine O'Brien told him that it was good that he was trying to protect himself; that during this discussion Josephine O'Brien talked about other drilling companies which had been organized by Local 150; that in his affidavit to the Board, General Counsel's Exhibit 29, he indicates that Josephine O'Brien said liberties would change; and that liberties, benefits, and privileges all mean the same to him in the involved context.

When called by the Respondent, Josephine O'Brien testified that Cooley came into her office and told her that he had been talking to the union because he was a family man and he had to think of himself; that she told Cooley "yes you do ... that's fine you do what you have to do" (transcript page 1121); that she did not recall ever saying to anyone that she could not afford to fight the Union; that she did not tell Cooley that STS had spent a lot of money fighting a union, and she did not know what STS had done; that she did not make a comment to Cooley to the effect that benefits and privileges would change if the union got in; that she did not make a comment to Cooley to the effect that employees would not be able to work overtime, and she never made this statement to any employee at O'Brien; and that she did not tell Cooley that it would be a different company if the Union got in, and she never made this statement to any employee at O'Brien.

On April 23 Cooley attended a union meeting along with O'Brien employees Herrick, Huffman, Panozzo, and Campbell. Cooley testified that Panozzo "had a big list of questions that he was drilling Stan [Simrayh] about, nothing unusual" (transcript page 89); that he was notified about the April 23 union meeting by the Union organizers; and that the organizers told the employees at the gasoline station in the morning about the upcoming union meeting.

Myers, who was on the task force organizing the Respondent's employees, testified that the following individuals attended the April 23 union meeting: Cooley, Herrick, Huffman, Scoma, Campbell, Roger Malham, Panozzo, and Simrayh. On cross-examination Myers testified that he was present at this union meeting which took place at Garibaldi's Pizza Shop, which is about 2 miles from the Respondent's facility, on the evening of April 23; that Local 150 was represented at this meeting by Simrayh, Mike April, and Malham; and that Simrayh was in charge of the Union's efforts to organize the Respondent's employees.

Herrick testified that Garibaldi's is in Arlington Heights, and the meeting was held in the evening after work; that in addition to the employees talking among themselves, there was another way that a person would know about the union meeting that night in that someone had written on the dry erase board by the time clock in the hallway at O'Brien "Union meeting at Garibaldi's tonight" (transcript page 481)¹²; that he saw the above-described notification on the erase board as he was ready to punch out on April 23; that at the union meeting Panozzo asked a number of questions which an employee would not normally ask, namely would Josephine have to pay dues and how much, would she be able to keep her minority status, could she run the business the way she wanted to run the business, and how would hiring be affected; and that Simrayh told the employees present at the union meeting that someone should talk to Josephine O'Brien and have her call the Union and try to settle things. On cross-examination Herrick testified that Scoma, Huffman, Panozzo, Campbell, himself, Cooley and Union representatives were present at this meeting; and that the meeting lasted about 2 hours.

Panozzo, who was called by the Respondent, testified that at this April union meeting he said that it looked like they had enough cards to bring it to a vote, and he was told they were looking for just one more card to be signed and they were going to stick with the picketing. On cross-examination Panozzo testified that the meeting was attended by employees Herrick, Cooley, Huffman, Campbell, Scoma, and by Union representatives Simrayh, April, someone named Jim (Myers), and Malham; that during the meeting he might have said that he would talk to Josephine O'Brien about union organizing but he could not really recall; and that Simrayh asked him to speak to Josephine O'Brien about contacting the Union and he refused.

Josephine O'Brien testified that there is a dry erase board up near the time clock between Wandell's and Pilipiszyn's offices; that the company does not use the dry erase board; and that

[mostly] the guys use it to write Happy Birthday or they write a lot of silly things on there, Go Cubs, or somebody's got a new girlfriend, they'll write her name on there. It's more used by the guys. I never look at it, I've never written on it. I've never erased anything on it. I don't even know who put it up. [Transcript page 829]

When called by the Respondent, Josephine O'Brien testified that she has never seen any writings on the dry erase board concerning a union meeting; that she did not ask Panozzo to attend a union meeting; that she never asked Panozzo if he attended a union meeting; and that she never discussed with Panozzo or any other employee any union activity they may have engaged in. On cross-examination Josephine O'Brien testified that she never looks at the erase board to read what is on it or get any information from the messages on the board but she may glance at it as she walks by it and she may notice something silly on the board.

When called by the Respondent, Wandell testified that on April 23 he never saw a message on the erase board about a Union meeting at Garibaldi's Pizza; and that he never saw a message on that erase board concerning any union meetings. On cross-examination Wandell testified that he hangs a calendar in his office; that Charging Party's Exhibit 1 is a copy of the calendar he had hanging in his office in, as here pertinent, April 2003; that "Local 150 meeting

¹² The time clock is located next to Wandell's office. Mandat, who was not able to attend this union meeting, testified that there was a notification of this union meeting on the dry erase board next to the time clock which is between the contiguous offices of Wandell and Pilipiszyn; and that the notification read "Union meeting tonight at Garibaldi's." (transcript page 688).

at Pizza Hut" is written on the April 24 block of the calendar but he did not make this notation; that on the April 24 block of the calendar he wrote "10 AM Joint Meet"; and that he believed that he first saw the notation regarding the union meeting when he took the page down at the end of April 2003.

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Herrick testified that on April 24 he wrote a note to Josephine O'Brien and left it by her purse; that in the note he advised her that if she wanted to settle things with the Union and get jobs back, she should give the Union a telephone call; and that he did not sign the note but rather he wrote anonymous at the bottom of the note. Mandat testified that Herrick told him on April 24 about writing the note, what it said, and leaving it by the purse of Josephine O'Brien.

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On April 28 Cooley saw a memorandum, General Counsel's Exhibit 38, taped to Wandell's office door.¹³ Cooley testified that the memorandum indicated that "we were cut down to forty hours only a week, no overtime, eight hours a day" (transcript page 90); that before he went home on April 28 he, along with Herrick, asked Wandell about the memorandum; that Wandell said that he was "going to cut to forty hours only, eight hours a day, no overtime. ... unless ... there's only one hole left to finish up, the job and it wasn't going to take that long, then ... [they] ... [could] stay ... and finish off the job" (transcript page 91); that Wandell also told them that he would be stopping at their jobsite the next day; and that Wandell did not come to the jobsites often while they were there, with the last time being in 2002.

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Herrick testified that when he arrived at work on April 28 he noticed a note on Wandell's door which indicated that the employees should "keep our work down because of the lack of, keep our days down to eight hours, 40 hours a week because of the lack of work" (transcript page 501); that later that day, after he had received his commercial driver's license, he and Cooley, in Wandell's office, were told by Wandell that they should "keep ... [their] work days down to eight hours unless ... [they] could start a hole and finish within a half-hour overtime, just as long as it's not two or three hours overtime because of the lack of work" (transcript page 502); and that Wandell told them that he would stopping at their jobsite the next day, which was unusual.

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Mandat testified that on April 28 he saw a memorandum on Wandell's office door which said everyone's hours were restricted to 40 hours a week, that overtime was only allowed if it was necessary in completing a job, and they did not want to lay anyone off. On cross-examination Mandat testified that O'Brien pays overtime for working more than 40 hours a week, not for working more than 8 hours on a particular day.

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When called by Counsel for General Counsel, Wandell testified that the notice posted on his door on April 28 did not have any limit on the hours per day; and that other than the notice, this information was not communicated to the employees in any other fashion. On examination

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¹³ The document reads as follows:

NOTICE
DUE TO THE DIMINISHED WORK LOAD
UNTIL FURTHER NOTICE

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WE NEED TO LIMIT TO 40 HOUR WORK WEEKS

Exceptions can be made if the extra time is spent finishing up a
job. We do not want to lay anyone off so please watch your
hours.

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We anticipate an increase in the workload shortly.
Jim/Josephine

by one of the counsel for the Respondent when he was called by Counsel for General Counsel, Wandell testified that employees would have first seen this posting on April 28; that when he arrived at work on April 28 around 8 a.m. he did not recall that any of the drillers or field technicians were still in the shop; that he did not believe that he had any conversations with the employees regarding this particular notice; that between the beginning of February and through April 2003 O'Brien was kicked off a total of between 10 and 20 drilling and inspection jobsites; that it was his understanding that O'Brien was asked to leave jobsites because pickets had been set up by the Union; that this resulted in a reduction of the amount of hours worked by employees; that O'Brien does not pay overtime for hours worked over 8 hours in a workday but it does pay overtime for hours worked over 40 hours in a week; that an employee can work more than 8 hours in several work days and still not exceed 40 hours in a work week; that he did not think he had a conversation on the afternoon of April 28 with either Cooley or Herrick about the limitation to 40 hours a week because he left between 3:30 and 4 p.m. to go to a little league practice; that he did not recall telling Herrick or Cooley that the limitation meant that they should not work more than 8 hours a day; that generally employees work in the 9 hour range on a given day; that this was the first time in the 10 years that he was at O'Brien that he could remember having to limit overtime; and that he did not believe that he told Cooley on April 28 that he, Wandell, would be out at the jobsite on April 29, and he did not tell Herrick. On redirect Wandell testified that he was in the office on the afternoon of April 28 and he left about 3:30 p.m.; that he believed that on April 28 Cooley and Herrick were working on the project at 39th and Cottage Grove; that, as pointed out by Counsel for General Counsel, Cooley took Herrick to get his commercial driver's license on April 28; that he was in his office most of the day on April 28 and he did not leave the facility to eat lunch; that he did not know what time Cooley and Herrick went home that day; that as indicated by his time card, General Counsel's Exhibit 28, Cooley punched out at 2:08 p.m. on April 28; that he "probably" (transcript page 955) was still in his office at the time Cooley punched out; that as indicated by General Counsel's Exhibit 36 Herrick punched out at 1:47 p.m.; that he "probably" (transcript page 956) was still in his office at the time Herrick punched out on April 28; that he was in his office in the afternoon when Cooley and Herrick punched out to go home; and that he did not recall having any conversation with Cooley or Herrick about anything on April 28. On further redirect Wandell testified that he did not see Cooley or Herrick on April 28.

Panozzo, who was called by the Respondent, testified that "instead of making good money this year [2003], make the good overtime during the main construction season, we were limited to 8 hours a day" (transcript page 1006). Panozzo further testified that the construction runs from the Spring to the Fall; that he did not recall seeing General Counsel's Exhibit 38 before; that he got his understanding that he was limited to 8 hours a day from his supervisor Pilipiszyn¹⁴; that Pilipiszyn told him that if he, Panozzo, was out in the field working the hours are billable and he could get overtime but if he worked in the office Monday through Fridays he could expect an eight hour day, if something came up he would let him finish it but typically it is just 40 hours a week; and that Pilipiszyn told him this six or seven months before he testified at the trial herein.

When called by the Respondent, Josephine O'Brien testified that the Respondent had lost work and it was trying to keep everybody at 40 hours and not run into overtime

¹⁴ Panozzo testified on further redirect that Eisenhut, who he reports to, sometimes works in the field, he is a senior field inspector like him, and Eisenhut does not evaluate his work, discipline him, or give him time off; that Eisenhut is his supervisor to a certain extent in that Eisenhut instructs him in the lab; and that Eisenhut reports to Pilipiszyn.

unnecessarily; and that much of the diminished workload was due to union activity.¹⁵

Cooley testified that his daily work routine involved punching in on the time clock, possibly getting a cup of coffee in the lab, loading up the daily supplies that he needs, getting gasoline for the drill rig at one of the two Speedway stations that Respondent has an account with, using the rest room at the station, and purchasing a snack, drink, newspaper, and cigarettes; that he is not aware of any company rule against picking up a drink or a snack while he fills up at the gas station, and all of the drillers and helpers do it; that he spends between 15 and 45 minutes at the gas station depending on the number of vehicles that have to get fuel; that he is paid for this time; and that he is not aware of any of the Respondent's employees being disciplined for getting a snack or a drink at the gas station for the ride to the jobsite in the mornings. Cooley also testified that lunch breaks are 30 minutes unpaid; that he is allowed not to take a lunch; that when he does not take a lunch he writes no lunch or "NL" on his time card so that 30 minutes of pay is not deducted from his pay; that he has seen other drillers and helpers do the same thing; that before April 29 on his way back to Respondent's facility or between jobsites he has stopped to use a restroom or grab a quick snack and keep on going; that such stops take from 2 minutes to 15 minutes, they are included in the driving time, and they are not recorded on his timecard; that he has been with other drillers and helpers who work for the Respondent when they have stopped for snacks or to use the restroom on the way back to the shop; and that no one at the Respondent has ever told him that making a restroom or snack stop was the equivalent of taking a lunch.

On April 29 Cooley rode to work with Herrick and they punched in at 6:15 a.m. Cooley testified that they grabbed a cup of coffee, loaded up their daily supplies, took the paperwork for that day, and headed for the gas station; that they left the gas station about 7:15 a.m.; that he and Herrick arrived at the jobsite located at 39th and Cottage Grove in downtown Chicago at about 9 a.m.; that the job was a city permit job in that they had to obtain permission from the city to do the job, they could not start before 9 a.m. and they had to stop at 4 p.m.; that it took a long time to drill the hole they were working on that day because the drill hit granite pavers, a railroad tie, and blowing sand; that Wandell showed up at the jobsite that day; that he told Wandell that he was drilling "the hole from hell" (transcript page 95), and showed him the spike and the teeth which had been busted up; that Wandell told him that there was another hole he could drill after he finished the one they were working on; that he told Wandell that he would do the second hole if he had enough time to do it; that he did not believe that he could work overtime to drill the second hole because the day before he saw a memorandum indicating that the employees were cut to forty hours a week "which is eight hours a day" (transcript page 96); that Herrick was wearing a safety vest with Local 150 printed on it at the jobsite that day; that Herrick was within eyesight of Wandell at the jobsite that day; that he and Herrick left the jobsite at about 12:30 p.m. that day; that they stopped on the way back to Respondent's facility so that he could use the restroom; that Herrick, who was driving the drill rig that day, parked the rig on a side street because the parking lot at Wendy's was small and the rig was big¹⁶; that he used the restroom and Herrick bought a sandwich and a drink; that they were in Wendy's for about 10 minutes,

¹⁵ Josephine O'Brien estimated that the Respondent probably lost somewhere in the area of maybe a million and a half dollars of work. It appears that she was testifying in terms of October 2003. She testified that she told employees to lose the Union representatives who attempted to follow them to jobsites. Josephine O'Brien also testified that the Respondent's normal gross annual revenue is in the neighborhood of \$3 million and so the \$1.5 million represents about one half of O'Brien's annual gross revenues. Pilipiszyn testified that Josephine O'Brien did not tell him to tell employees to lose the Union representatives who followed them.

¹⁶ Wandell estimated the gross weight of the vehicle to be 32,000 pounds.

leaving at about 1:40 p.m.; that Herrick ate the food he bought at stoplights while driving back to the shop; that Herrick had just obtained his commercial driver's license the day before; that they got back to the shop around 2 p.m.; that he filled out the daily paperwork in Wandell's office¹⁷; that Wandell asked him how things went, and he told Wandell that they were not able to drill the second hole because they did not have time to do it in view of the fact that they were cut to eight hours a day and no overtime; that Wandell asked him if he took a lunch break and he told Wandell that he did not take a lunch break; that he then punched out, writing no lunch on his time card, and he then went to his car; that Wandell opened the front door of the facility and said that he wanted to see him and Herrick in his office; that Josephine O'Brien and Wandell were in the office when he got there; that O'Brien asked him if he took a lunch and he said no, O'Brien told him to quit lying to her, he told her that he was not, O'Brien told him that Wandell saw him at Wendy's, he told O'Brien that he had to use the bathroom, O'Brien told him that she did not care if he did not buy anything in Wendy's and that he did not have any company loyalty, he told O'Brien that he had done stuff for the company on his own time, O'Brien asked him if he thought that she and Wandell were stupid and did not know what was going on, O'Brien waved the time cards in the air and asked him what she should do with them, he told O'Brien that it was her choice, Herrick came into the room, O'Brien asked Herrick if he took a lunch and he said no they stopped at Wendy's to go to the bathroom, he bought a sandwich, they left, and they were there for about ten minutes, and when Herrick asked O'Brien what time they were at Wendy's O'Brien said she did not know and Wandell had the time; that O'Brien handed the time cards to Wandell and told him to write it up; that O'Brien and Herrick left Wandell's office and he asked Wandell what was going on, and if Wandell did not care if he lost him as a driller; that Wandell said that he did not want to lose him as a driller; that he told Wandell that just the other week he, Cooley, picked up an alternator at Car Quest on his own time so the drill rig would not be down all day; that he told Wandell that not too long ago Wandell caught Campbell stealing a whole half hour from the company; that Campbell had written 7:00 on his time card when Wandell had seen him on the road, Wandell changed the time card entry to 7:30 and initialed the change, and nothing was done to Campbell¹⁸; that Wandell said that this is not about Campbell that it

¹⁷ The field report that Cooley filled out on April 29, General Counsel's Exhibit 46, indicates, as here pertinent, as follows:

....
Job Name CHA Infrastructure

....

Total Load/Unload/Fuel Time ... 1.5
Total Travel Time ... 3
Total Drill/Core Time ... 3.5

....

Total Chargeable Hours 8

Tasks Performed: Include Soil Boring/Core No., Depths, Auger/Casing used (Size and Length), Core Dia., Backfill, Etc.

Drilled S-8 to 37.5' Continues to 7' Then 2.5' Sampling to 37.5' Very hard drilling for the first 4" First attempt on S-8 had 6'E offset hit a railroad track 2nd attempt was 7'E offset Got through then hit a railroad spike on the railroad tie. Backfilled and patched

Standby Time ... / Maintenance ... /Other, Explain: Set-up Traffic Control, Major Cleanup, Breakdowns, Escort Delay, Weather, Etc.
Changed 10 bullet teeth & 2 shields

....

Equipment Damaged, Lost or otherwise needing attention 10 bullet teeth & 2 shields

¹⁸ General Counsel's Exhibit 10 is Campbell's time card for the week ending January 10. Mandat testified that he saw Campbell's time card with Wandell's change on it.

was about him and Herrick; that he told Wandell that this was about the Union, and Wandell just wanted to get rid of him and Herrick, to which Wandell, who had a stunned expression, did not reply; that Herrick told him that Josephine O'Brien wanted to see them the next morning¹⁹; that his time card for April 28 and April 29 shows that the "no lunch" entry he made for both of these days was crossed out by Josephine O'Brien; that this was done in his presence; that he explained to Josephine O'Brien that he was at commercial drivers license facility all day on Monday April 28 and she wrote "no lunch" back in; that she left the crossing out of the "no lunch" for April 29, and she initialed the crossing out; that he had never been disciplined for anything by the Respondent before his discharge; that he has never received a warning, a write-up, or a suspension from the Respondent; that Bassi was suspended by the Respondent for being chronically late, after his suspension he was late again, and he believed that Bassi still worked for the Respondent; that Wandell has indicated that the drillers and helpers are supposed to be at the shop at 7 a.m.; that sometimes when they arrive after 7 a.m. they do not punch in but rather they write in their start time; and that he did not take a lunch break on April 29 and he did not falsify his time card for April 29.

On cross-examination Cooley testified that he considers a lunch break at the Respondent's to be when he takes 30 minutes off, generally around noon, and is not doing any work for the Respondent; that he returned to the Respondent's facility anywhere between 1 p.m. and 10 p.m. depending on the work being done; that it takes him about 10 to 15 minutes to complete his paperwork and then he punches out and goes home; that the drilling is to take soil samples to determine the condition of the soil for building purposes; that on the day he was terminated he was working on "the hole from hell" (transcript page 239) in that he was drilling through a spike, a railroad tie, and rolling sand, and he had a breakdown of equipment; that during the week or so that he was on the involved project he was drilling at least two holes a day; that on the day he was terminated he left O'Brien and about 6:30 a.m., he arrived at the site of the job at approximately 9 a.m., and he left the site at about 12:30 p.m.; that on a bad day he would drill 30 feet; that when Wandell came to the jobsite he told Wandell that it was a difficult job; that he believed that the hole he was drilling that day required that he drill until he was 5 feet into clay; that he did not remember exactly how deep the hole ended up being; that when he spoke with Wandell at the jobsite that day he was still drilling in the sand; that Wandell told him to drill another hole when he was done with the hole he was working on; that Herrick was wearing a safety vest at the jobsite that day and the safety vest had Local 150 written on the reflective portion; that he thought that Herrick may have said hello to Wandell at the jobsite that day; that he and Herrick stopped at a Wendy's on the way back to the Respondent's facility because he had to use the rest room; that when they got to Wendy's there were "[m]aybe one or two people at the tables and that's it" (transcript page 266); that he was in Wendy's rest room for 5 to 10 minutes; that when they left Wendy's Herrick was holding a bag; that Herrick, who drove, had a drink and a hamburger in the bag, which he consumed when he stopped at traffic lights on the way back to the Respondent's facility; that when they got back to the Respondent's facility Wandell asked him if he drilled the second hole and if he took a lunch break; that he told Wandell that he did not have time to drill the second hole, and he did not take a lunch break; that he wrote no lunch on his time card for the day; that he was called into Wandell's office where Josephine O'Brien asked him twice if he took a lunch and he told her twice that he did not; that Josephine O'Brien then said "[q]uit lying, Jim [Wandell] saw you at Wendy's" (transcript page 272); that he then said that he used the bathroom; that Josephine O'Brien told him that Wandell saw him at Wendy's for half an hour, and she said that he, Cooley, had no company loyalty; that he denied being at Wendy's for more than 10 minutes; that Josephine O'Brien said

¹⁹ Cooley also testified that Josephine O'Brien said that she knew how many authorization cards were signed.

something to the effect that he was stealing time and she handed his time card to Wandell, telling him to write it up; and that for the second time he discussed Campbell's time card with Wandell.²⁰

5 On redirect Cooley testified that on April 29 the traffic from Respondent's facility into Chicago was terrible in that it was bumper to bumper; that on one occasion he spent approximately 45 minutes of his own time picking up an alternator and the needed supplies for the installation he performed the next day on one of the Respondent's trucks; that he did not order any food at Wendy's on April 29; and that on April 29 he did not steal any time from the company.

10 On further examination Cooley testified that if he had tried to drill the second hole on April 29 he would have had to move the drill rig after finishing at the first hole; that the set up at the second hole would have taken from 15 to 30 minutes; that considering the average amount of time he spent on the other holes in that area, excluding the "hole from hell," he would have needed approximately 2 hours drilling time; that with the time it would have taken to shut down the rig he would not have been on the road heading back to Respondent's facility until about 3:30 p.m.; and that it easily would have taken a couple of hours to get back to the Respondent's facility.

20 Herrick testified that his normal work routine would include getting to O'Brien about 6 a.m., getting all the paperwork ready, loading the truck, possibly getting coffee in the lab, going to the Speedway gas station on Elmhurst Road where O'Brien has an account, which is about 15 minutes from Respondent's facility, waiting for the one diesel pump to be available, while waiting getting something to eat, drink and read like the other O'Brien employees did; that depending on how long they had to wait for the one pump to be available, this stop usually took from 15 to 30 minutes; that none of this time was taken out of his paycheck in that it is not considered a break; that he was allowed 30 minutes for lunch and he was not paid for this time; that if he did not take a lunch break, he would write "no lunch" or "N/L" so that the 30 minutes would not be deducted from his paycheck; that he and other O'Brien employees have stopped on the way back to O'Brien and between jobs to use a restroom or get supplies or snacks, these stops usually took from 5 to 10 minutes, and this was considered as part of the travel time; and that he never received a copy of O'Brien's handbook, General Counsel's Exhibit 7.

35 Herrick further testified that on April 29 he arrived at O'Brien at about 6:15 a.m.; that he got the paperwork, loaded the truck, and he and Cooley left O'Brien about 6:40 a.m.; that they stopped at the Speedway gas station for about 15 minutes, leaving the station about 7:15 a.m.; that they arrived at the jobsite at 39th and Grove in downtown Chicago a little bit before 9 a.m.; that the City of Chicago permit allowed them to work from 9 a.m. to 4 p.m.; that it took about 3 hours to drill a 15 foot hole; that it does not normally take that much time to drill a 15 foot hole; that on the involved hole they started to drill the hole, they went through asphalt and hit a railroad tie; that they then offset the hole and started drilling through again and there was asphalt, concrete, and granite; that the granite takes a long time to go through; that he saw Wandell's vehicle somewhere around 10 a.m. or so; that later Wandell came to where he and Cooley were drilling; that he was about 5 feet away cleaning up the hole, shoveling, and taking samples while Wandell talked with Cooley; that he was wearing a hard hat and a reflective vest that day; that on the back of the vest he was wearing that day he had written "Local 150" and "Support Fair Wage," General Counsel's Exhibit 42; that he had his back toward Wandell while

50 ²⁰ According to Cooley's testimony, the first time occurred on the day Wandell caught Campbell trying to "steal" 30 minutes.

he was at the jobsite; that Wandell spoke with Cooley for about 5 minutes; that Wandell then went one block over to Ellis and he was there for about 5 minutes, and then he lost sight of Wandell; that he and Cooley finished drilling the hole about 12 noon; that it took about 30 minutes to clean the rig, put the samples away, clean and patch the hole, and take down the rig; that he then drove the rig, which weighs about 36,000 pounds, back to the shop; that this was the first time he drove the rig since he received his commercial drivers license the day before vis-à-vis driving with a permit; that on the way back he had to use the restroom so they stopped at Wendy's at 1:30 p.m.; that he knew it was 1:30 because he looked at the clock in the truck and it indicated 1:32 p.m.; that he checked the time "because ... [they] had been keeping times to write for ... [their] dailies and to make sure ... [they] were doing good on the eight hours" (transcript page 514); that he parked the rig on the side street near Wendy's because the rig is too heavy to park in Wendy's parking lot; that they were in Wendy's for 9 or 10 minutes; that he used the restroom and then ordered a junior bacon cheeseburger and a medium coke with no ice; that Cooley came in and used the restroom; that they left Wendy's at 1:41 and went back to the shop; that he did not consider the stop at Wendy's to be a lunch break because they were in Wendy's about 10 minutes; that he wrote "N/L" on his time card, General Counsel's Exhibit 36, that day; that he did not take a lunch hour on April 29 because they "would have been over [e]ight hours" (transcript page 519) which would have been a problem because Wandell did not want any unnecessary overtime; that after he punched out at 2:17 p.m., he went outside and waited for Cooley because he rode to work with him that day; that when Cooley did not come out he went back inside to Wandell's office to see what was going on; that Wandell, Josephine O'Brien, and Cooley were in the office; that O'Brien was waving two time cards in the air and she asked him if he had taken a lunch; that he told her when they stopped at Wendy's they could not have been there for more than 10 minutes; that O'Brien said that Wandell had seen them at Wendy's for 30 minutes, she told Wandell to put it in the computer, and then she walked upstairs; that he followed O'Brien to her office and he asked her if they could have a second chance; that O'Brien said "no, we have to keep morale in the company. She can't have people stealing from her" (transcript page 522); that he then asked O'Brien if it was about the union and the card he had signed and she said "no"; and that he said that plenty of other people signed cards and O'Brien said

that she knew that there ... [were] nine people that signed cards and she wasn't worried if it went to an election, it wouldn't go through anyways. She said that as a professional woman, she couldn't afford to have the union come in. And if the union came in she'd shut down because she worked her whole life to get where she's at and she's not going to throw it down the drain.

....

... she had called the union liars and stealing [sic] and thieves. And I told her that she was a liar because she had stolen from me prevailing ... wage. [Transcript pages 522 and 523]

Herrick further testified that he asked her if they could have another chance, and O'Brien said that she was too mad to talk to him and he should come back in the morning.

On cross-examination Herrick testified that he wrote "Local 150" and "Support fair wage" on the vest the day he picked it up at Top Gun, which is a supplier to O'Brien; that he picked the vest up in March or April 2003 before he was terminated; that on one side of the vest he wrote "Joe H. Local 150"; that the vest is left in the rig; that other than on April 29 Wandell did not see him wearing the vest with writing on it about the Union; that on April 29, Wandell did not say anything to him about the vest notwithstanding the fact that at another time Wandell had

commented to him about wearing a union hat; that when he first saw Wandell's vehicle at about 10 a.m. on April 29 it was parked west of Cottage Grove by some housing project approximately 200 to 300 yards from the hole he and Cooley were drilling; that Wandell's vehicle was in that location for about 10 minutes and then it stopped by the police station around the corner from the hole they were drilling; that they were working in the center lane of the street; that before approaching them Wandell sat in his vehicle at one location for 10 to 15 minutes and then spent about another 10 minutes walking around the police station; that Wandell approached their rig about 10:30 a.m.; that he was 5 feet away from Wandell and Cooley and he overheard Cooley tell Wandell of all of the problems they were having with the involved hole, Wandell ask Cooley if they could get another hole done, Cooley say no because of all the problems they were having, and Wandell saying that Cooley should just make sure to watch his overtime; that the drill was on idle speed; that he was shoveling the hole at the time; that his May 13 affidavit to the Board indicates that he could not hear part of the conversation between Wandell and Cooley because he was shoveling; that if he had gone north on Elmhurst from Oakton on the return trip, the Speedway gas station they stop at in the morning was 2 miles north on Elmhurst; that after he turned from Oakton onto Busse going south and he was stopped at a stoplight "right before Wendy's" (transcript page 621), he asked Cooley if he wanted to use the restroom; that he ate while he was driving from Wendy's to O'Brien's facility; that while he only heard the loud voice of Josephine O'Brien as he went back into Respondent's facility on April 29 after he waited for Cooley, his May 13 affidavit to the Board refers to voices; that when Josephine O'Brien said that he should quit lying to her he said that they stopped at Wendy's, he grabbed a sandwich and a drink while Cooley was in the restroom and he could not have been more than 10 minutes; that after he followed Josephine O'Brien to her office he asked her if they could get a warning because O'Brien just jumped to conclusions; that he asked if they could get a second chance and O'Brien said that she was going to have to keep an eye on the company and she could not have people lying and stealing from her; that he then asked O'Brien if this was about the Union; that he did not say that he could make the Union go away if he could keep his job; that he then asked O'Brien if this was about the card he signed and O'Brien said "no"; that he then told O'Brien that there were plenty of other people who signed cards and O'Brien said that she knew that nine had signed cards, and if it was going to an election she was not worried about it; that O'Brien also said that she worked her whole life to get where she was at and as a professional woman she was not about to throw her career away because of the Union, she was not going to let the Union bring her down and that she would shut down; that O'Brien said that the Union was full of liars and he called her a liar because she had stolen from him; that he then asked O'Brien if they could get a second chance and she said to come back tomorrow because she was too mad at the time; that O'Brien was visibly upset at the time; and that on their ride home that day Cooley told him that Josephine O'Brien asked him if she should fire them and Cooley told her that he did not know, he did not care.

When called by Counsel for General Counsel, Josephine O'Brien testified that the Respondent does not have any policy concerning employees making a food stop or eating while they drive to a jobsite; that before he was terminated, she could not remember Cooley ever being disciplined, except maybe verbally; that Cooley was a good employee; that Herrick, who had never been disciplined except maybe he was verbally counseled by a supervisor, was a fair employee; that General Counsel's Exhibits 23, 24, 25, and 26 are documents maintained by the Respondent relating to discipline of employees²¹; that employees are allowed to take a lunch

²¹ General Counsel's Exhibit 23 is an incident report dated July 7 concerning Mandat having a shouting altercation with Tom O'Brien. Josephine O'Brien testified that she did not know if Mandat was disciplined by anyone. General Counsel's Exhibit 24 is a 1998 memorandum to file regarding Bassi being unavailable for work for various reasons. Josephine O'Brien testified that

Continued

break during the day; that employees are allowed to take a rest room break, they are allowed to stop on the way back from a job if they need to use the rest room, and they would not be docked time; that if employees during such a stop picked up something to eat and they continued on their way she would not really know about it and she probably would not care; that on a regular basis employees do not take a lunch break and write either "N.L." or "no lunch" on their time card; that frequently an employee's start time and/or end time are written in vis-à-vis stamped by the time clock; that she crossed out the "no lunch" on Cooley's time card for April 29, General Counsel's Exhibit 28, and the "N/L" on Herrick's time card for April 29, General Counsel's Exhibit 36, which was the date there was a dispute as to whether or not they had taken a lunch break; that Cooley and Herrick had written "no lunch" or "N/L" many times before and there was never a problem before April 29²²; and that on April 29 Wandell telephoned her and said

I was just driving down and I saw our truck going the wrong, well, in the opposite direction that I would expect it to be going in. And he said, so I followed them and they're in Wendy's. He said, I don't know why they're here, it's just, it's out of the way. And he said, should I sit here and watch them.

....

I found the rig. I saw where they parked it. They're in Wendy's, I assume, because it was parked on the side street by Wendy's. And he said, should I wait here and see what they're up to? And I said, yes, I think that would be a good idea. [Transcript pages 799 and 800]

Josephine O'Brien further testified that Wandell telephoned her on the cell part of his Nextel phone at approximately 1:15 p.m. and it could have been up to 2 minutes later; that she next spoke with Wandell a little after 2 p.m. when he returned to the facility and he called her on the intercom since her office is on the second floor and his is on the first floor; that she did not remember if Wandell came upstairs or not when he first came back to the facility on April 29; that when Wandell called her on the intercom it was after Cooley and Herrick had punched out

Bassi was suspended for three days in March 2003 for coming to work late; that Bassi was a driller and when he came to work late it impacted his driller's helper; and that Bassi still worked for the Respondent at the time of the trial herein. General Counsel's Exhibit 25 are three documents which relate to Campbell regarding his not showing up for work in 2002 and on August 20 and 22, and recommending that he receive a suspension and probation. General Counsel's Exhibit 26 is a four-page document which refers to an incident involving Broadway. Josephine O'Brien testified that the documentation concerns an incident in June 2002 where there was a question whether Broadway went to a jobsite while under the influence of alcohol; that Broadway was put in the hospital and he then went to a rehabilitation facility for a month; that she gave Broadway a second chance and took him back to work; that Broadway was not disciplined; and that Broadway was still employed by the Respondent at the time of the trial herein. On cross-examination when called by the Respondent, Josephine O'Brien testified that she never issued a written reprimand to Broadway; and that the Respondent's safety manual, General Counsel's Exhibit 8, is the only written disciplinary policies that the company has. Broadway testified that he was not disciplined over this incident; and that he was not under the influence of alcohol.

²² From November 2002 to May 2003 (excluding two weeks for which the time cards were not supplied) Cooley wrote "no lunch" 23 times and Herrick made a similar entry on his time card 27 times.

and Wandell asked her to come down to his office; that since Cooley and Herrick punched out at 2:17 p.m. on April 29 Wandell probably called her about 2:18 or 2:19 p.m.; that before that Wandell either came upstairs or he called her on the intercom and told her how long they were in Wendy's; that the next time she spoke with Wandell after he telephoned her while Cooley and Herrick were in Wendy's, she could not remember if he came into her office or used the intercom but it was around 2 p.m. and Wandell said "they just left, I stayed there with them, I drove back to the office and they were there for a half hour ... probably having lunch, and then he went downstairs" (transcript page 802); that she then continued with whatever she was doing until Wandell called her to say that Cooley and Herrick had punched out and written "no lunch" on their time cards; that if Cooley and Herrick decided to take a lunch break, there was no restriction as to where they could take a lunch break; that the problem arose when Cooley and Herrick returned to the facility and did not declare that they had taken a lunch break but rather treated the stop as driving time; that the problem which arose over this incident did not exist when Wandell first followed Cooley and Herrick; that Wandell did not have a habit of telling her that an employee was on a lunch break, a snack break, or a rest room break; that when Wandell called her on the intercom after Cooley and Herrick had punched out she told Wandell to call them back into his office and she went downstairs; that four times Cooley told her that they did not have lunch, she kept telling Cooley that he was lying to her, and Cooley said that he was not lying to her; that finally Cooley said "okay, we stopped but I didn't eat" (transcript page 807); that Cooley denied being in Wendy's at all; that Cooley said that he came right back from the job three times and then she started yelling at him; that Herrick was not there for her entire conversation with Cooley; that she had both Cooley's and Herrick's time card in her hand during this conversation; and that

I was yelling at him, I was just furious. And I said ... I've got a good mind to fire you and ...[Cooley] said, well, go ahead. And that of course just made me twice as mad, and I said, you know, this is wrong. We trust you people, and I don't know, I was blah-blah, whatever, I was just furious, just yelling, and I said you're both fired. And I stormed upstairs. [Transcript page 809]

Josephine O'Brien further testified that Herrick followed her upstairs and he asked for a second chance; that Herrick pointed out to her that other people had received a second chance but she believed that this occurred when she spoke with Herrick on April 30; that on April 29 she told Herrick to call her the next day and he said "I'll do anything you want, even get rid of that, pointing outside to the union" (transcript page 810); that she told Herrick that it had to do with honesty, he had been put on his honor, and it had nothing to do with the Union; that she then told Herrick to get out of her sight; that if she had a conversation with Wandell on April 29 after Cooley and Herrick left she did not remember it; that she did not discuss her decision to terminate Cooley and Herrick with anyone on April 29; that when Wandell first telephoned her on April 29 there was nothing unusual for an employee to stop at a place like a Wendy's but "it absolutely was unusual to be heading in the opposite direction from the office" (transcript page 823); and that when Wandell called in at 1:18 p.m. she told Wandell to stay there and watch Cooley and Herrick because

Well, I found over the years, you get lax in watching your employees and they ... [take] advantage. And I just felt maybe it's time we started taking a little bit closer look at people and what they're doing. And it was just a situation that happened to come up that brought it about, not any particular person. That was what it was about. [Transcript page 825]

Josephine O'Brien further testified that all she asked Wandell to do was stay there and watch Cooley and Herrick; that when Wandell first called her on April 29 at 1:18 p.m. gut instincts

made her believe that this was a situation different than any other situation where two employees might stop at a place to eat lunch and pick a place that they like even though it might be three or four blocks out of the way; that the gut instincts were based on the fact that it seemed goofy that they would do that but there was not really any particular reason; that she
 5 decided to terminate them after they wrote "no lunch" and then lied to her; that it had nothing to do with having lunch, everybody can have a lunch; that the only information she had at that moment regarding how long they were in Wendy's was what Wandell told her; that Cooley and Herrick were fired because they lied on their time cards; and that she accepted Wandell's statement over their statement.

10 Josephine O'Brien testified that with respect to Campbell's time card for the week ending January 10, General Counsel's Exhibit 10, which includes an incident, as noted above, which was raised by Cooley to Wandell on April 29, that during the week of January 10 she did not work that weekend at O'Brien & Associates because she was in Aruba; and that when Wandell
 15 called her at 1:18 p.m. on April 29

[h]e said that he saw the rig going in the opposite direction and he was wondering what they were up to. And he turned around, I don't know where, just turned around, followed them and that he was, they were parked on a side street and they were
 20 in Wendy's and should he sit there and see what they're up to or see what they do? And I said yes, stay there and see. And that was all the conversation was ... half a minute, a minute, I'm not sure. [transcript page 837]

Josephine O'Brien further testified that she did not remember Herrick accusing her of stealing from him; that yes she did hear him say that but she did not steal from Herrick; that she had no idea why Herrick accused her of stealing from him; that she did not remember Herrick saying it related to the company's failure to pay him the prevailing wage; that O'Brien has not had a single contract from any public entity requesting prevailing wage so therefore O'Brien does not pay prevailing wage; that the State Department of Labor is currently pursuing prevailing wage
 25 violations against O'Brien & Associates; that no determination had been made with respect to the prevailing wage and she found out about it in the last few weeks before she testified (October 29); that the Illinois Department of Transportation forwarded a letter to O'Brien indicating that the involved professional engineering contract O'Brien has with that Department does not come under the prevailing wage; and that two departments within the State of Illinois
 30 are taking conflicting positions.
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When called by the Respondent, Josephine O'Brien testified with respect to April 29 that she did not have a discussion with Herrick about the signing of union authorization cards; that Herrick told her that she did not fire Bassi and she gave Bassi another chance but she did not
 40 "really know exactly what was said" (transcript page 1148); and that she did not recall Herrick accusing her of stealing from him.

When called by Counsel for General Counsel, Wandell testified with respect to the matter raised by Cooley on April 29, namely, Campbell's time card, that he crossed off "7:00" on
 45 the entry for January 8 on Campbell's time card, General Counsel's Exhibit 10, and wrote in "7:30" initialing the entry; that he saw Campbell on the road on the way to work and he looked at Campbell's time card after he left the facility to go out on a job; that when Campbell returned to the facility that afternoon he told Campbell that he had seen him on the road at 7:25 a.m. and he was going to change the entry to 7:30 a.m.; and that Campbell admitted that he was not at the
 50 O'Brien facility at 7 a.m.

When called by Counsel for General Counsel, Wandell testified that on the morning of

April 29 he went to the CHA Infrastructure Project which is generally at the intersection of 39th Avenue and Cottage Grove in Chicago, about 35 miles from the Respondent's facility, to lay out additional soil borings; that he waited until 9 or 9:30 a.m. to leave so that he would not be driving in heavy traffic; that he arrived in the vicinity of 39th and Cottage Grove at 10:15 to 10:30 a.m.; that when he first arrived in the area he did some layout work, marking a drilling location with white paint, a block or a block and a half west of Cottage Grove and north of Pershing; that he did layout work for 30 to 40 minutes; that he then pulled in behind Cooley's drill rig which was stationed in the center lane on the northbound side of Cottage Grove, and he placed a magnetized light on top of his Chevrolet Tahoe; that since the drilling was in a public right of way, a street, O'Brien had to obtain a permit from the City of Chicago, and generally the City allows the work to be performed only from 9 a.m. to 3 p.m. because of traffic concerns; that Cooley then stopped the drill rig but left the engine running and he talked with Cooley for 3 to 4 minutes; that Cooley explained that he was having problems with the hole that he was drilling; that in that end of town there are 5-inch thick granite paver blocks that are extremely difficult to get through, railroad ties and railroad tracks that have been long buried in the street and are invisible to the naked eye; that it is "just a crap shoot" on whether they end up drilling a hole in that kind of a situation, and they might be able to drill one inch over and not hit all of these obstacles; that he saw Herrick at the drilling site and Herrick was wearing work clothes, a safety vest, and a hard hat; that he then went to 15th and Pulaski to check out a site on which they were going to be submitting a drilling proposal, arriving at about 11:30 to 11:45 a.m.; that he was at 15th and Pulaski for about 20 minutes; that when he left 15th and Pulaski he was returning to O'Brien's facility, taking Interstate 290 west to Busse Road north, General Counsel's Exhibit 4(a); that just south of Oakton Street, which is an east-west road which intersects Busse, he saw Cooley's rig going south on Busse, instead of north in the direction of O'Brien's facility²³; that this occurred about 1:05 p.m.; that he decided to turn around and see where Cooley and Herrick were going; that he turned off Busse and onto Oakton going west; that he made a U-turn on Oakton before going a full block so that he was heading east, and then a right on Busse heading south; that he had lost sight of the rig; that since the traffic light at Oakton was pretty long it probably took him 2 to 4 minutes before he could make the U-turn; that he waited for traffic to clear at the traffic light at Oakton and Busse and then he turned onto Busse to go southbound; that since he had lost sight of the rig he turned west off Busse onto Brummel or Howard Street looking for the rig; that he continued driving west and at some point he turned left heading south for one block and then turned left at the next block heading east; that he worked his way down to Jarvis Street and turned off Busse onto Jarvis Street heading west; that he saw the rig parked on Jarvis, in plain view about 75 feet from Busse; that Wendy's is located on the northwest corner of Jarvis and Busse; that it took a little while driving the side streets because he was going slow looking both ways for the rig, which he thought they were hiding; that there is a lot of truck traffic in the area which slows you down and he thought that his first westbound, southbound, and eastbound circuit took 1.5 to 2 minutes; that about 30 seconds later he saw the rig; that he went about 750 feet west of the rig and pulled up into a wide driveway of a truck dock; that he wanted to watch the rig and see how long Cooley and Herrick were going to be in Wendy's; that he did not see Cooley and Herrick go into Wendy's but there was no one in the rig when he passed it; that he sat watching the rig for 25 minutes; that he guessed that he got to the rig at 1:20 p.m.; that he watched the rig for 25 minutes because "[w]hen I saw the ... rig on ... [Busse], it was just out of place given my conversation with ... [Cooley] two hours earlier. And I wanted to determine why they were out of place so early in the

²³ If Herrick and Cooley made a right off Oakton onto Busse they, like Wandell, would have been heading in the direction of O'Brien's facility. Instead they made a left on Busse. It appears that, according to Wandell's testimony, Herrick and Cooley had driven less than a block south on Busse when Wandell first saw them.

day" (transcript page 881); that after 25 minutes Cooley and Herrick walked out of Wendy's, got into the rig, and drove west on Jarvis right past him; that Cooley and Herrick turned right at the first stop sign; that he went east on Jarvis and north on Busse; that when he was just down the street from the rig on Jarvis he telephoned Josephine O'Brien at 1:18 p.m.²⁴; and that

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I asked Mrs. O'Brien if ... [Cooley] had contacted her to tell her that there was a, if there was any problems with the drill rig or any reason why they should be in the area. Our maintenance facility is on Oakton, probably a quarter of a mile east of Busse and that would be a probable reason why they would be in the area is to be going to the repair shop if they had a breakdown. So, I asked her, did they indicate to you, did they call or indicate any kind of a problem which was why they were coming back early? And she said no. I said, well, they're parked outside of Wendy's here and I just want to know what they're doing here.

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Wandell further testified that he asked Josephine O'Brien if he should stay and watch them and she told him to do that; that this is the first time that he ever telephoned Josephine O'Brien and described circumstances like this; that he was "curious why they were in the area at 1:00 o'clock given our conversation at 11:00 o'clock" (transcript page 884); that Jarvis is three quarters of a mile from Oakton; that it was 1:43 when he saw Cooley and Herrick come out of Wendy's and get back into the rig, and he knew this because he "knew it was 25 minutes of elapsed time by ... [his] truck clock. By the time I saw them [this was later changed to "from the time I saw the truck parked at Wendy's"] to the time I saw them get in the truck and drive by" (transcript page 900); that he got back to the office 2 or 3 minutes before 2 p.m.; that Cooley and Herrick returned to O'Brien's facility at 2:05 p.m.; that he asked Cooley how much he had got done and Cooley said just the one hard hole, and they even skipped lunch; that at that point in time he did not tell Cooley that he saw him at Wendy's because "I didn't care what they're doing at the Wendy's if they're on a legitimate lunch break" (transcript page 887); that he wanted to see what Cooley did with his time card and his field report because he "felt [that] ... [Cooley] was going to be dishonest" (transcript page 888); that he realized that it "was a difficult project because of the pavement conditions, but ... [he] did not feel that ... [Cooley and Herrick] were giving their best effort" (transcript page 888); that perhaps he said something to Cooley and Herrick that they weren't doing their best effort on the job, and "[t]hat's why I might even have stopped to see them that day to encourage them to get more done that day" (transcript page 888); that prior to that day Cooley and Herrick had not been disciplined for not doing good work on their job, and he could not remember them ever being disciplined for anything; that after Cooley repeated that they did not take a lunch break and then went to fill out his paperwork, he, Wandell, went upstairs and told Josephine O'Brien that Cooley denied taking a lunch and she said "well, let's see what they fill out on their time cards" (transcript page 889); that this was the first time he spoke with Josephine O'Brien after he telephoned her from Jarvis Street earlier that day; that after Cooley and Herrick punched their time cards he retrieved them and called Josephine O'Brien on the intercom and told her that they wrote "no lunch" or "N/L" on them and he told her that he "observ[ed] ... [Cooley and Herrick] for 25 minutes at ... Wendy's [and] ... they indeed did by all appearances take a lunch" and "I told her that I had observed them at Wendy's for, it looked like they were taking a lunch for 25 minutes minimum and they indicated on their time cards that they did not take a lunch" (transcript page 893); that Josephine O'Brien instructed him to stop Cooley and Herrick and have them come to his office and she would come down; that he called out to Cooley and Herrick in the parking lot to come to his office; that Cooley came into

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²⁴ Wandell testified that he was not sure of the time because his truck clock may not have been in sync with his Nextel phone time but he had no reason to dispute the Nextel time which was 1:18 p.m.

the office first and then Herrick came into the office; that he gave the time cards to Josephine O'Brien when she came into his office; that Josephine O'Brien asked Cooley if he had taken a lunch and he told her he had not; and that

5 Mrs. O'Brien continued to accuse ... [Cooley] of taking a lunch, taking a half hour for lunch. He continued to deny it. She asked him three times, he denied it three times. On the fourth time she asked him, he stood there and said, yes, we stopped but I didn't eat.

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By that time, I think she had said you stopped, we know you stopped at the Wendy's. Jim was outside watching you for 25 minutes. And with that information, that's when he said, but I didn't eat. [Transcript page 894]

15 Wandell further testified that Josephine O'Brien asked Cooley if he took a lunch and he replied "no," she said "we know you took a lunch" and he replied "no," she said "we know you really did take a lunch" and he replied "no," she said we know you stopped at Wendy's, Jim was watching you outside the restaurant, we know you stopped to take a lunch, you wrote on your time card
20 no lunch, you're cheating me, and Cooley says but I didn't eat; that Herrick walked into the office and they indicated to Herrick that there was a problem in that he and Cooley stopped for lunch and they indicated on their time cards that they did not take a lunch; that Josephine O'Brien said "you're cheating us, I don't like to be cheated, and then you stand there and deny it" (transcript page 895); that Herrick said that it was Cooley's idea; that Josephine O'Brien said she felt betrayed, she gave them a job and helped them out and they do this to her; that he did
25 not recall Josephine O'Brien asking Cooley or Herrick what their version of the Wendy's event was; that Cooley did not have anything to say, Josephine O'Brien said "go on, get out of here, you're fired," and Cooley and Herrick left his office; that O'Brien left his office and he was alone in his office after that; that Josephine O'Brien did not ask him what he thought should happen to
30 Cooley and Herrick, it was all her decision; and that on April 29 he wrote a memorandum concerning what happened that day (which memorandum, as noted below, was attached to a position statement the Respondent submitted to the Board); that as pointed out in the memorandum he first saw the rig going south on Busse at 1:12 p.m., he called Josephine O'Brien while he searched for the rig, and he was on the phone with her for 3 minutes²⁵; that
35 when he noted that Cooley and Herrick got back in the truck at 1:40 p.m. he was going by the clock on his dashboard; that in his April 29 memorandum he indicated that Cooley said that he did not start drilling another hole because of the guideline that was posted on April 28 regarding limiting work to 8 hours a day; that Cooley did the math (dividing 40 hours by 5 work days); that he was not sure if he clarified the notice for Cooley; that he did not correct Cooley about the 8
40 hours; that although he testified that Cooley and Herrick took a 25 minute break, he put 30 minutes in his memorandum because he factored in travel time off course and the time it takes to get back on course to get back to the office; that in his memorandum he indicates that Cooley said that he did not eat lunch and Herrick said that the stop was for 10 minutes only; that in his memorandum he indicated that Cooley said that Herrick wanted to stop; and that later Herrick
45 said that it was Cooley's idea to stop.²⁶

²⁵ Wandell testified "[I] [p]honed her before I found the drill rig or during or while I found the drill rig." (transcript page 906)

²⁶ It is not indicated in Wandell's memorandum that Herrick said that it was Cooley's idea to stop.

On examination by one of the counsel for the Respondent when he was called by Counsel for General Counsel, Wandell testified that he goes to jobsites usually two and sometimes three times a week; that with a complicated job he has to go out and do a lay out; that the job at 39th and Cottage Grove was a large very complicated job; that he was sure that he went to jobsites where Cooley and Herrick were working a total of six times in the last six months before they were terminated; that he probably saw them at the jobsites every time that he visited the jobsite; that he saw Herrick that day at 39th and Cottage Grove walking back and forth doing his work; that when he pulled up to the rig Cooley, shut down the rotation of the augers, idled the engine, and came back to meet him at the front of the Tahoe; that he did not know if Cooley knew that he, Wandell, was coming to the jobsite that day in that he did not see Cooley that morning so he would not have had the opportunity to tell him that he was coming out to that particular jobsite; that when he spoke with Cooley at about 11 a.m. on April 29 he asked him how deep the hole was; that at that point in time the hole was 30 feet deep; that Cooley told him that he had difficulty in starting the hole and he, Wandell, could see various holes in the area that he had tried; that he knew that it was going to be a difficult hole because they had drilled up and down the street before and encountered the same conditions; that Cooley told him that he had just entered clay; that when they hit clay it should be easier; that they were supposed to drill 5 feet into clay; that they went 37 feet with the sampler and by 11 a.m. they were real close to being at the end of the hole; that it should have taken 30 minutes to drill 7 feet in clay; that he told Cooley after he finished the hole he was drilling, to go to some of the other holes and get some more done today; that Cooley said "no problem" (transcript page 936); that while he saw what Herrick was wearing, he did not see any writing on Herrick's safety vest; that he never saw the vest shown in General Counsel's Exhibit 42, which is a picture of a vest with writing on it; that he expected Cooley and Herrick to drill another hole; that he saw Cooley's rig on Busse at approximately 1:05 p.m. according to his truck clock; that it took him 6 or 7 minutes to find the truck at Wendy's and his truck clock showed "[a]pproximately 1:12, 1:13, 1:14 [p.m.], somewhere in there" (transcript page 939); that when he saw the drill rig leave Wendy's it was "[a]bout 25 to 2:00, 20 until, 25 until, somewhere in there" (transcript page 939); that he did not know if a lunch break started when the employee leaves a jobsite or when he gets to a restaurant, it is left up to the employee to monitor themselves; that he has never monitored lunch periods for the employees; that only Josephine O'Brien has the authority to terminate; that at 1:05 p.m. he expected Cooley's rig to be at 39th and Cottage Grove; that O'Brien's facility is about 4 to 6 miles from the intersection of Oakton and Busse, which is 15 to 20 minutes driving time; that 39th and Cottage Grove is approximately 35 miles from Oakton Street and State Route 83 (which can be Oakton Street's intersection with Busse Highway or Elmhurst Road since Route 83 runs east and west between these two intersections); that there are a number of fast food restaurants between O'Brien's facility and Oakton Street off Elmhurst Road, Respondent's Exhibit 5 (None of the described facilities is a Wendy's.); and that there is a McDonald's on the toll way near the exit for Elmhurst Road.

On redirect Wandell testified that he thought that Herrick was wearing an orange safety vest; that he is color blind and has a problem with reds and greens; that he was sure that the vest was the safety vest that O'Brien purchases for its employees and it is the correct colors; that if Cooley had equipment problems during the drilling of the last 7 feet of the hole it would take him longer to drill the hole; that he was not present while Cooley drilled the hole; that the boring log did not indicate that there were any problems whatsoever on it; that while the field report, General Counsel's Exhibit 46, shows that bullet teeth and shields were changed on the rig Cooley and Herrick were using on April 29, those changes would have occurred during the first and second attempts to get through the pavement; that the McDonald's on the toll way near Elmhurst Road has truck parking facilities and it did not close for reconstruction until June or July 2003; and that the CHA Infrastructure project is charged by the total footage that is drilled for the project, not by the hours the driller and his helper put in each day.

Wandell further testified that while he previously testified twice that he did not follow Cooley and Herrick on April 29 when he saw them on Busse Road near Oakton Street because they were union supporters, he did not know that they were union supporters; that he saw Cooley wear a hat which said Operating Engineers, Local 150 on it before April 29; that he did not know if wearing a union hat constitutes union support; that he never saw Herrick wear any union paraphernalia; that for the most part he was able to see Herrick getting into the rig at Wendy's, there was a lot of truck traffic on Jarvis, semis backing in and out, but he thought he had a pretty good view of Herrick climbing into the vehicle; and that he did not see Herrick holding a bag.

When called by the Respondent, Wandell testified that between January and April 2003 he never saw Herrick wear a union hat, a union button, or a union vest (Actually, Herrick testified that he wore a vest, which was paid for by the Respondent, with handwriting on it about the Union.); that on April 29 Cooley said that he fixed trucks on his own time; that he did not reply to that; that he did not recall Cooley making any comments about the Union during their April 29 discussion; that he did not remember any mention of Campbell at this meeting; and that during this April 29 conversation Cooley did not accuse O'Brien & Associates of terminating him because of his union activities. On cross-examination Wandell testified that while Cooley pointed out that he had done things on his own time, he, Wandell, did not write that down in his memorandum regarding what happened that day.

On April 30 Cooley met with Josephine O'Brien. Cooley testified that Pilipiszyn was about 10 feet away when he approached Josephine O'Brien; that he asked Josephine O'Brien if they could talk in private and she moved about 10 feet away; that when he asked Josephine O'Brien what was going on she said that it was decided last night that the decision is "going to stick" (transcript page 110); that he asked her what was he going to do, mentioning that his son was just born; that Josephine O'Brien said that it was time for him to grow up and take responsibility for his actions, and since he had a commercial drivers license, it should not be hard for him to find a job; that he told Josephine O'Brien that he thought that this was all about the Union; and that Herrick was on the telephone in Wandell's office, and Herrick said that he had been talking to Wandell over the telephone, it would be a while before Wandell would arrive at the facility, the decision was not going to be changed, and it was not worth waiting.

Herrick testified that on April 30 he drove by himself to work, arriving at 6 a.m.; that he spoke with Josephine O'Brien in the lab, asking her if they still had their jobs; that O'Brien said that she was going to have to stick to her word and they were terminated; that O'Brien never asked his version of what time they got to Wendy's and what time they left Wendy's; that O'Brien told him that he should not have a problem getting a job since he just received his commercial driver's license; that he asked O'Brien if they were in Wendy's for half an hour what were the times; that O'Brien said that she did not know the times, Wandell knew them, and if he wanted to talk to Wandell when he came in, he could talk to Wandell; that he then went to Wandell's office and telephoned Wandell, who usually arrives at work at 8:30 a.m.; that he reached Wandell by telephone and asked him if they were at Wendy's for half an hour what were the times; that Wandell said that they were at Wendy's from 1:20 p.m. to 1:45 p.m.; that he asked Wandell how come he said 30 minutes on April 29 and now he was saying 25 minutes; that Wandell said those were the times he had; that he asked Wandell about the fact that Bassi, Campbell, and Huffman were given second chances and he was fired; that Wandell said they had nothing to do with the situation at hand²⁷; and that he then went back to the lab and spoke

²⁷ Herrick testified that Campbell would write times on his time card which was not correct

to Josephine O'Brien, telling her that today Wandell said it was 25 minutes and yesterday Wandell said that it was 30 minutes; that he asked O'Brien about Huffman, Bassi, and Campbell and she said that they had nothing to do with him; that he had never been disciplined by the company for anything prior to his termination on April 29; that he had never received a written
 5 warning, he had never been suspended, and he had never been discharged and rehired; that Respondent's employee Brian Hatley was fired and rehired two or three times; and that he never stole time from O'Brien.

On redirect Herrick testified that there is a reference to his wearing a vest in his May 13
 10 affidavit to the Board; that when he is in the field he is on the honor system with respect to breaks and stops; that on April 29 or April 30 O'Brien did not ask him what time they got to Wendy's, what time they left Wendy's; that he spent 1 to 2 minutes in the restroom at Wendy's and then he purchased the food; that Cooley spent a little longer than he did in the restroom; that they arrived at Wendy's around 1:30 p.m. and they left Wendy's at 1:40; that Wandell and
 15 Cooley were 10 feet behind the drill rig while they talked and he was 5 feet behind the drill rig during this period, which was 5 feet from Wandell and Cooley as they spoke; that landscapers and box trucks also use the one diesel pump at the Speedway they stop at on Elmhurst; and that they did not attempt to drill another hole on April 29 because if they ran into the same problems they would have been a way over the overtime guidelines explained to them by
 20 Wandell.

With respect to April 30, Josephine O'Brien testified that she spoke with Cooley and Herrick together in the new lab when they came in about 7 a.m.; that she told them that she had not changed her mind, and the decision stands; that Cooley and Herrick both said "okay"; that
 25 this conversation lasted about 2 minutes; that she told Cooley and Herrick that she would see what she owed them; that she believed that Herrick went into Wandell's office to telephone Wandell but she went back into the lab; and that she did not think that she spoke with Herrick again that morning after he telephoned Wandell.

When called by the Respondent, Josephine O'Brien testified that she never saw Herrick, Cooley or Mandat wearing a Local 150 button, hat, or vest; that when she terminated Cooley and Herrick she did not consider the Respondent's safety and enforcement procedures, General Counsel's Exhibit 8 with respect "probably driving and eating at the same time." (transcript page
 30 1139); that Wandell told her that Huffman was sleeping on the job but it was during his half hour for lunch; that she first learned of Wandell changing Campbell's time card to reflect the time
 35 Campbell actually arrived at work when she was at the trial herein; that she terminated Brett Gunty because when she was reprimanding him, yelling at him for causing severe damage to one of O'Brien's vehicles by carelessness, and he told her to go "fuck ... [herself]"; that Johnny Silva was fired for no call no show on a Friday after a July 4 holiday; that Brian Hatley was fired
 40 for attendance problems; that during the last 5 years she was not aware of any employee who had stolen time from her; that to her knowledge, during his employment at the Respondent Campbell never engaged in dishonest conduct; that with respect to Cooley saying to her on April 30 that this was all about the Union, she thought the comment was made but she was not sure if it was said on April 29 or 30th, and she told Cooley that it had nothing to do with the
 45 Union; that she did not recall Herrick raising O'Brien's treatment of Campbell, Bassi, and Huffman on April 30th; that she did not terminate Cooley because of his union activities; that she did not terminate Herrick because of his alleged union activities or because he provided a

and Wandell would okay them, Bassi was late for work even after he was suspended over
 50 attendance problems, and Huffman told him that Wandell caught him sleeping on several occasions and Wandell did nothing to Huffman.

statement to the Board; that she did not care if Herrick provided a statement to the Board; and that if any other employee provides a statement to the Board, it creates problems and she cares about it but they have a right to do what they think is best for themselves.

5 When called by the Respondent, Wandell testified that he did not receive a telephone call from Herrick on the morning of April 30; that he has found Huffman sleeping at a jobsite, it was generally the noon hour, Huffman was obviously taking a cat nap during lunch time in an area where it was safe, he did not have a problem with that, and he assumed that Huffman was doing his half hour lunch period; that he always woke Huffman up, talk about the project, and Huffman would start working; that Respondent does not have a rule against people napping on their break; that he has seen Huffman asleep three times in the eight years he has been with the Respondent; that he has never posted a notice and he has never verbally given instructions to employees to the effect that (a) if an employee comes in late any more than two times he would be terminated, or (b) employees could no longer write in times on their time cards; that he never had a conversation with Mandat regarding the discipline given to Bassi; and that other than Cooley, Herrick, and Campbell he was not aware of any other employee being dishonest in reporting his time. On cross-examination Wandell testified that he never reported to Josephine O'Brien that he saw Huffman napping. Wandell further testified that on the last occasion when he saw Huffman napping he talked with Huffman about what work he had done, he looked at the logs and he asked the helper who was there what had been done; and that he did not check Huffman's time cards on the two or three days he found Huffman napping to see whether Huffman put "no lunch" on his time card.

25 Mandat testified that he stopped every morning at the gas station; that O'Brien's employees fill up the vehicles and also get something to eat and/or drink for the road; that they spend from 15 to 30 minutes at the gas station depending on how long they have to wait for the pump; that the employees are paid for this 15 to 30 minutes; that the employees are given 30 minutes which is unpaid time for a lunch break; that if the employees do not take a lunch they can write "no lunch" or "N/L" on their time card so that 30 minutes will not be deducted from their pay; that he has made stops on the way back from a job or in between two jobsites to use the restroom or to get something to drink after a long hard day; that a few times a week he has stopped to use the restroom or to get a drink or a snack on the way back to the shop or in between jobsites and the stops generally take 10 to 15 minutes; that such stops are recorded as driving time and the employees are paid for this time; that Wandell knows that the drillers and driller's helpers make these 10 to 15 minute snack or bathroom stops because he has told Wandell about them and Wandell has heard the employees discuss things that have happened during some of these stops; and that neither Wandell nor any other O'Brien manager or supervisor has ever indicated to him that they have a problem with him making such stops, he is not required to tell them when he makes such stops, he has not been told that such stops are equivalent to taking lunch, he has never been asked to account for this 10 to 15 minutes of time, and to his knowledge no O'Brien manager or supervisor has made it a point to observe him while he was taking this time.²⁸ Mandat further testified that he and his driller fill out a daily report for the Respondent which has the job name on the sheet, the job number, the date, the job location, what rig was used, any support vehicle used, the hours for their load/unload time, travel time, drill time, any other time incurred, what they did that day, what supplies were used, and if there were any delays or there are any problems that need attention. On cross-examination Mandat testified that sometimes when they stop at the Speedway gas station in the

50 ²⁸ Mandat also testified that he and driller Kowalski were supposed to work on a Saturday in 2002, they both were no call no shows, they neither received a write up nor a suspension nor were they fired, and they continued to get Saturday work assignments.

morning they do not get any fuel but rather they stop for a drink or a snack; that if an employee took a 25-minute break, stopping at a fast-food restaurant, using the rest room and having some food, they would be lying if they put "no lunch" on their time card; that O'Brien's employees are on the honor system because supervisors and managers are not watching over them every minute of the day, and O'Brien counts on the fact that its employees are being honest; that there are occasions when a driller and his helper start the day at a jobsite, or do not go into O'Brien's office at the end of the day, and they subsequently write in their time on the time card; that Wandell is responsible for the layout of the jobs and so at some point he pretty much needs to be at every job; and that he has worked at the 39th and Cottage Grove job and it is a very difficult job to drill. On redirect Mandat testified that if he made a 10-minute stop on the way back from a jobsite to use the restroom and grab a sandwich, he would not consider that to be lunch.

On cross-examination Mandat testified that at the end of April 2003 or the beginning of May 2003 he asked Josephine O'Brien what she was going to do about the Union following him and she said that she was going to let the lawyers handle it, there was nothing she could do; that during the week of May 12 he asked Josephine O'Brien what the status was of her and the company trying to fight off the Union and she said that she did not care who signed authorization cards; that he initiated both of these conversations; and that sometime in April, May, or June, 2003 Bassi told him that he was upset because the employees were restricted to 40 hours a week and they were losing money because of the Union. On redirect Mandat testified that on May 12 Josephine O'Brien said "that the union just wouldn't work" (transcript page 739); and that Bassi never told him that he wanted to withdraw his union card or his support for the Union.

Panozzo testified that when he is out in the field he does not have a supervisor watching him as to when he would go to the bathroom, whether he took a lunch, or how long his lunch break was; that there have been times where he has taken over 30 minutes for lunch and he called it a lunch break; that if he takes an hour for lunch he lets them know how much time he has taken off; that he has put down "NL" so that 30 minutes for a lunch break is not deducted from his paycheck; that he is on the honor system; that during the work day he occasionally has to use the rest room and if he used the rest room in a restaurant he might buy something to eat; and that on April 30 he heard Cooley muttering that he had only taken a 15 minute break at Wendy's and management said that he had taken a 45 minute break.

General Counsel's Exhibits 44 and 45 are May 16 decisions of the Illinois Department of Employment Security granting Cooley and Herrick, respectively, unemployment benefits. Both decisions indicate that the claimant denied taking a lunch break and both decisions include the following language: "Attached is Nextel invoice indicating phone call to the office at 1:18 backing up time involved." Josephine O'Brien testified that O'Brien paid the involved Nextel bill and this was the time that Wandell telephoned her.

III. Union Authorization Cards

Malham, who is a task force organizer for Local 150, testified that he got some of the Respondent's employees to sign union authorization cards; that he witnessed Scoma sign a union authorization card on February 5, General Counsel's Exhibit 13, and he, Malham, signed the card as witness on the same date; that he saw Bell sign a union authorization card on March 19, General Counsel's Exhibit 14, and he told Huffman to sign the card as witness; and that he saw Bassi sign a union authorization card on March 20, General Counsel's Exhibit 15, and he

saw Huffman sign as witness.²⁹ On cross-examination Malham testified that he did not recall whether he had a conversation with Bell regarding the purpose of the union authorization card, and he did not make any representations to Bell concerning any promises or benefits he might receive from the Union if he signed a card³⁰; that Scoma was getting a breakfast sausage at the Speedway gas station at Algonquin and Elmhurst Streets (near or in Des Plaines, Illinois) the day he signed his union authorization card; that he asked Scoma to read the union authorization card before signing it, and the card was pretty much self-explanatory; and that some days before Scoma signed the union authorization card he told him at the parking lot of a repair facility that the card authorized the Union to represent him. On redirect Malham testified that he thought that he asked everyone to read the union authorization card before they signed it.

Charles August, a business agent organizer for Local 150, testified that in February 2003 he witnessed Huffman fill out and sign a union authorization card, General Counsel's Exhibit 22, at Denny's Restaurant in Schaumburg, Illinois; that he told Huffman that the authorization card allowed the Union to be the sole bargaining agent for him and the other employees; that Huffman signed the card on or about the date at the top right of the card where it indicates "Date 2-8-03"; and that he signed the card as witness. On cross-examination August testified that he did not know who wrote the date, "2-8-03," on the upper right hand corner of the card; that the handwriting on the other portions of the card, namely "Street, city, phone number, state, zip code, social security number, employer, and job classification" is Huffman's; and that he watched Huffman complete that portion of the authorization card.

When called by the Respondent, Huffman testified on cross-examination that he signed the union authorization card; that the Union did not threaten him to get him to sign the card, and he did it on his own free will; and that the Union did not make any promises to get him to sign the card.³¹

Kowalski, who is a former employee of the Respondent, testified that he was a friend of Campbell for 18 years and he worked with Campbell at O'Brien; that in March of 2003 Campbell filled out a union authorization card in his presence, General Counsel's Exhibit 21; that the printing on the card is Campbell's; that Campbell wrote the date on the card, namely "3/19/03," and completed the card on this date; that he signed Campbell's card as witness on March 19; and that Campbell passed away in September 2003.

Myers, who was a member of the Union task force organizing the Respondent's employees, testified that he witnessed Daniel Mandat sign a union authorization card on February 5 at a Speedway gas station, General Counsel's Exhibit 16; that he signed Mandat's card as witness on February 5; that he witnessed the signature of Panozzo on March 28 on a

²⁹ When he testified at the trial herein, Malham could not recall whether Bassi signed it on the hood of the truck or if he was inside the vehicle.

³⁰ As here pertinent, the card reads as follows:

I hereby designate the INTERNATIONAL UNION OF OPERATING ENGINEERS and its subordinate Local Union No. 150 to represent me for the purpose of collective bargaining and in any and all other situations that may arise under the operation of the National Labor Relations Act, and/or with any individual employer where the provisions of the National Labor Relations Act are not involved.

³¹ Huffman was an employee of the Respondent at the time of his testimony. With Josephine O'Brien sitting at counsel table, one of the Respondent's attorneys asked Huffman if he wanted his union authorization card back. It is not hard to imagine Huffman's response, which response is not given any weight considering the circumstances.

union authorization card, General Counsel's Exhibit 17; that on March 28 he signed Panozzo's card as witness; that he signed Cooley's union authorization card, General Counsel's Exhibit 11, which is dated February 6, on the witness line; that he saw Herrick sign his union authorization card on February 6, General Counsel's Exhibit 12, and he, Meyers, signed the card on the witness line; and that after he obtained these cards he turned them over to union organizer Simrayh. On cross-examination Myers testified that he obtained a union authorization card from Charlie Patel in June or July 2003; and that he told Panozzo to read the union authorization card. On redirect Myers testified that he saw Charlie Patel fill out the union authorization card, General Counsel's Exhibit 18, on July 16; that he signed Charlie Patel's card on the witness line; and that he did not make any promises to Charlie Patel to get him to sign the card, and he did not tell Charlie Patel that he better sign the card or else.

Panozzo, who was called by the Respondent, testified that at times Union representatives followed him around when he was not at O'Brien's facility³²; that in return for signing the union authorization card, General Counsel's Exhibit 17 dated "3-28-03," the Union never promised him anything, and never offered him anything; and that prior to signing the card the Union never talked about getting a vote at O'Brien. On cross-examination Panozzo testified that General Counsel's Exhibit 17 is his union authorization card; that his card was witnessed by James, and he was the only organizer named Jim (The card is signed on the witness line by James Myers.); that he completed the information on the card and he read it before he signed it; that in signing he card he designated the Union (As set forth above, the card designates the Union to represent the signer for the purpose of collective bargaining in any and all situations that may arise.); that he signed the authorization card of his own free will; and that he was not threatened to sign the card.

Mandat testified that on February 5 he signed a union authorization card, General Counsel's Exhibit 16, at a gas station in the morning and he gave it to Myers, whom he saw sign the card on the witness line at that time; that when he signed the card, no union representative told him that the card was to get a vote, or an election, or a bargaining order, and no union representative made any threats toward him, or any promises to him; and that he signed the union authorization card because he wanted to organize O'Brien.

William Selman, who is an employee of H. H. Homes which is another construction testing firm, testified that he is a member of Local 150; that his business agent, Simrayh, asked him to assist with the organizing drive at O'Brien; that he was not compensated for his efforts; that he signed on the witness line of the union authorization card of Pankaj (Pinky) Patel, who signed the card on July 16, General Counsel's Exhibit 19; that he was present when Pankaj signed the card; that he obtained a union authorization card, General Counsel's Exhibit 20, from Vipul Ray who signed the card on July 25, which is the same day he, Selman, signed the card on the witness line; and that he gave the cards to Simrayh. On cross-examination Selman testified that he told Pankaj Patel that the authorization card was the first step of organizing O'Brien and getting a contract, after he showed Pankaj Patel a collective bargaining agreement; that he formerly worked with Pankaj Patel at TSC in 1998; that he showed Vipul Ray the contract and he told Ray that the card was the first step in organizing O'Brien; that the contract

³² Broadway, who was called by the Respondent (subpoenaed), testified that Union representatives (a) have followed him to jobsites and to his home, at the jobsites they photographed him and video taped him, and they photographed his new company truck with him in it; and that he never felt the Union representatives were in his personal space. On cross-examination Broadway testified that often he leaves for a job in an O'Brien truck from his house and he returns to his house in an O'Brien truck without going to O'Brien's facility.

he showed Ray was the contract of H. H. Homes or Flood Testing, and he had the contracts because he had worked for both companies; that Ray said that a couple of their jobs had been shut down, and he told Ray that he was sorry to hear that; that Ray filled out his union authorization card; and that Pankaj Patel filled out his union authorization card.

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When called by the Respondent, Josephine O'Brien testified that she never asked employees at O'Brien & Associates whether they signed the union authorization cards.

IV. Position Statements

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Counsel for General Counsel introduced two position statements the Respondent submitted to the Board. In its May 28 position statement, General Counsel's Exhibit 2, the Respondent asserts that there is no evidence that O'Brien & Associates was aware of any protected activity by either Cooley or Herrick; and that no manager at O'Brien & Associates was aware that either Cooley or Herrick provided statements to the Board. The Respondent submitted an attachment to the statement, which attachment is a memorandum of Wandell dated April 29. In it he indicates, among other things, that:

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I witnessed Jason Cooley and Joe Herrick traveling south bound on Busse Hwy. (Rt 83) in Elk Grove Village at 1:12 pm driving the CME 75 drill rig. I made a U-turn to find out where they were going. While trying to find them, I called Mrs. O'Brien and asked her if Jason or Joe called her about problems with the rig or an explanation on why they were back in the area. I then found the drill rig parked on the side street at the Wendy's at Busse Hwy. and Jarvis St. They would have entered the Wendy's about 1:15. I observed them get back in the vehicle at 1:40. I drove back to office and arrived at 2 pm. The rig then arrived at the office at 2:10.

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In its July 8 position statement, General Counsel's Exhibit 3, the Respondent asserts that Cooley and Herrick stopped nearly 25 minutes to eat lunch at a fast food restaurant and then claimed on their time cards that they had skipped lunch in order to claim more work time; that the Respondent has no knowledge and therefore denies the allegation that Campbell scratched out 7:30 a.m. on his time card, wrote in 7 a.m., Wandell initialed the time card, and Campbell was not disciplined; and that when Kowalski and Mandat failed to show up as directed for a Saturday drill they were disciplined in that Wandell stopped asking them to work weekends.

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When called by the Respondent, Josephine O'Brien on cross-examination testified that she thought the allegation that is covered in the July 8 position statement was that Wandell gave Campbell an extra one half an hour, which she knew that Wandell did not do; that she would most likely be disappointed if Wandell was aware of something that was not honest and he did not bring it to her attention; that for the week ending January 10 she was in Aruba; that she heard Wandell's testimony at the trial herein that he caught Campbell signing in at 7 a.m. when he saw Campbell on the way to work and he knew that Campbell did not get to work until 7:30 a.m.; that for the July 8 position statement she asked Wandell if he gave Campbell an extra one half hour for any reason and Wandell told her that he did not; that she first became aware that Wandell changed Campbell's time card, General Counsel's Exhibit 10, from 7 a.m. to 7:30 a.m. at the trial herein; and that it was her understanding that Campbell did not lie about it, he did try to cheat, and he was caught and stopped.

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V. Compensation of Witnesses

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On cross-examination Cooley testified that Union representative Simrayh promised to compensate him at the rate of \$25.50 per hour plus the cost of meals to make up for his lost

wages while he participated at the trial in this matter. On redirect Cooley testified that he was not being paid by his current employer while he attended the involved proceeding; that no one from the Union paid him or promised to pay him to change his testimony; and that he did not change his testimony in any way.

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On cross-examination Herrick testified that the Union was not compensating him for attending the hearing herein. At the time of the trial herein, Herrick was not employed but was receiving worker's compensation.

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On cross-examination Panozzo testified that his hourly rate of pay at O'Brien is \$19.75 an hour, and he believed that he was going to receive his regular work pay while he attended the instant trial, he was "going to put it on his time." (transcript page 1018).

Analysis

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Paragraph V(a) of the complaint alleges that Respondent by Josephine O'Brien about January or February 2003 at its facility threatened employees with the subcontracting of its drilling work if they selected the Union as their collective bargaining representative. General Counsel contends on brief that the Respondent violated the Act when at the end of January or the beginning of February 2003 Herrick overheard Josephine O'Brien threaten to shut down and to subcontract if the Union came in, even though Josephine O'Brien may have been unaware of Herrick's presence at the time the threat was made. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997). The Charging Party argues on brief that at the end of January or the beginning of February 2003, Herrick overheard O'Brien say that if the Union came in, she would shut down, and this threat was repeated on April 29. The Respondent contends on brief that Josephine O'Brien and Pilipiszyn deny that the former said that if the Union got in she would shut down and subcontract.

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As noted above, Herrick testified that somewhere toward the end of January 2003 or the beginning of February 2003 he went to the lab one morning to get coffee, and on his way into the lab he overheard Josephine O'Brien tell Pilipiszyn "that if the union was to come, she'd end up shutting down the subcontracting" (transcript page 471). It does not appear that a literal reading of Herrick's testimony would be, as alleged in the complaint, threatening employees with the subcontracting of Respondent's drilling work if they selected the Union as their collective bargaining representative. The Respondent has subcontracted and Josephine O'Brien testified that she believed that the employees at two of the three subcontractors the Respondent uses are represented by the Union. Perhaps it is a typographical error. As pointed out by the Charging Party on brief, it is alleged that on April 29 Josephine O'Brien threaten to shut down. Nonetheless, to find a violation of the Act based on what was said in January or February 2003, the language at issue should not leave a question as to whether what was said can be interpreted to mean what was allegedly said.³³ I do not believe that it has been shown that the

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³³ It is noted that on cross-examination Herrick gave the following testimony:

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Q. And you testified that you heard Ms. O'Brien say that if the Union came in, she'd shut down and - -.

A. Yes, sir.

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Q. Do you know what month [this took place]?

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A. End of January, beginning of February maybe. [Transcript pages 569 – 70]

In my opinion, this testimony, when considered in conjunction with Herrick's direct, is not sufficient to warrant a finding that Herrick made the statement alleged in the complaint since

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Respondent violated the Act as alleged in paragraph V(a) of the complaint.

Paragraph V(b) of the complaint alleges that Respondent by Josephine O'Brien about February 2003 at its facility interrogated employees about their union activities. General Counsel contends on brief that Josephine O'Brien asked Mandat if union representatives had been following him or other O'Brien employees or if the union representatives said anything to him or the other O'Brien employees; that Mandat testified adversely to his employer's interests and therefore his testimony is entitled to additional weight; that in view of the fact that O'Brien had been placed on notice that it would not be able to complete one job and Josephine O'Brien was telling employees to lose the Union when they were followed, it is logical that Josephine O'Brien would have asked Mandat if the Union was following him and talking to him; and that under the parameters of *Rossmore House*, 269 NLRB 1176 (1984), O'Brien's interrogation certainly tended to restrain, coerce and interfere with Mandat's Section 7 rights guaranteed by the Act, thereby violating Section 8(a)(1) of the Act. The Respondent argues on brief that Josephine O'Brien never asked employees whether the Union representatives were following them; that even if she did ask this, (a) it would not be coercive, (b) it is not alleged that she told any employees not to talk to the Union representatives or that if they did, they would face reprisals, and (c) Union representatives following employees raised legitimate concerns since the Union was attempting to have O'Brien thrown off a job once the Union found out where O'Brien was working; and that under the totality of circumstances, the alleged conduct does not violate the Act.

As noted above, both Mandat and Herrick testified that in February 2003 Josephine O'Brien asked them if the Union was following O'Brien employees. With Mandat Josephine O'Brien also asked if the Union representatives said anything to him or the other O'Brien employees. Josephine O'Brien's testimony that she never asked an employee in 2003 whether members of the Union had followed their vehicles is not credited. For the reasons given below, I do not find Josephine O'Brien to be a credible witness. It does not appear that Josephine O'Brien specifically denied asking Mandat if the Union representatives said anything to him or other O'Brien employees. When the interrogations occurred, neither Mandat nor Herrick was an open union activist. The Respondent's legitimate business concern argument does not hold up when one considers that some of the conversations between the Union representatives and O'Brien employees occurred at the Speedway gas station in the morning before the employees even got to their jobsites. Knowing that the President and majority owner of the Respondent was asking employees about conversations between Union representatives and O'Brien employees would tend to restrain, coerce, and interfere with the employees' Section 7 rights. The Respondent violated the Act as alleged in paragraph V(b) of the complaint.

Paragraphs V(c)(i) and (ii) of the complaint collectively allege that Respondent by Josephine O'Brien about February 2003, in a telephone conversation interrogated employees about their union activities, and created an impression among its employees that their union activities were under surveillance by Respondent. General Counsel contends on brief that by February 3 Josephine O'Brien had already learned that the Union was following O'Brien employees as they left the O'Brien facility, and she knew that the Union was trying to organize O'Brien's employees; that it is completely logical, although illegal, that Josephine O'Brien would ask Cooley if he was planning to attend a Union meeting later that week; and that since the

it appears that on direct Herrick testified that Josephine O'Brien referred to shutting down the subcontracting. One might conclude that "she'd shut down and - -" refers to Josephine O'Brien shutting down her own business or a portion thereof, but still one would have to deal with Herrick's testimony of record on direct.

nature of O'Brien's interrogation was to uncover whether Cooley intended to attend a Union meeting later that week, Cooley assumed that his union activities had been placed under surveillance. The Respondent argues on brief that Josephine O'Brien denied asking Cooley whether he was going to attend a union meeting on February 6; that even if she did, in light of the totality of the circumstances such an innocuous question in and by itself in no way constitutes unlawful coercion; that Cooley admits that he initiated the conversation about the Union; that O'Brien saying that it was his choice whether he went to the union meeting mitigated any impression of union animus or coercion; that since the union organizing was both open and pervasive at that time, it is hard to imagine the employer's purported knowledge of a union meeting creating an intimidating perception of surveillance by the employer; and that this is particularly true where the conversation did not contain any threatening, intimidating, or coercive statements by Josephine O'Brien.

Josephine O'Brien is not a credible witness. She testified that she doubted that she knew that there was a union meeting. Although Broadway did not specifically testify that he personally told Josephine O'Brien that there was going to be a union meeting on February 6, he did testify that the Union approached him to go to union meetings and he informed the office that union meetings were taking place. Josephine O'Brien knew about the February 6 union meeting on February 3 when she spoke with Cooley. Josephine O'Brien asked Cooley if he was going to attend the February 6 union meeting. At this point Cooley was not an open and active union supporter. Cooley opened a door by bringing up the Union organizing drive. But that did not justify Josephine O'Brien taking advantage of the situation to demonstrate that she knew that there was going to be a union meeting on February 6, and to ask Cooley if he was going to attend. As Herrick testified when management asked him if he was going to a union meeting he said "no" because he was not sure if management was supposed to know about the union meeting. Herrick's reaction is a natural reaction on the part of an employee. It is only natural for an employee to wonder what is going on when an employer is asking him if he is going to attend a union meeting. The employee would undoubtedly wonder how did the employer find out that the employees were meeting to discuss organizing. Here the President and majority owner of the Respondent was telling Cooley that she knew that there was going to be a union meeting, and she wanted to know if he was going to attend. Unlike Herrick, it appears that Cooley felt compelled to tell management the truth. The coercive nature of the interrogation is demonstrated by the fact that Cooley felt that it was necessary to explain that he was going because he wanted to get some information, he wanted to help his family, and he wanted to improve his situation. O'Brien was seeking information upon which she could possibly take retaliatory action. O'Brien's telling him that it was his choice did nothing to mitigate her unlawful conduct. She was just stating the obvious. In doing so, however, she did not reassure him that not only is it his choice but it would not be held against him. O'Brien both unlawfully interrogated Cooley and she created the impression that the union activities of the employees were under surveillance by the Respondent. O'Brien was telling Cooley that she knew when the employees were holding union organizing meetings. The Respondent violated the Act as alleged in paragraphs V(c)(i), and (ii) of the complaint.

Paragraph V(d) of the complaint alleges that Respondent by Josephine O'Brien about mid-March 2003 at its facility interrogated employees about their union activities and participation in the Board investigation of the instant case. General Counsel contends on brief that Josephine O'Brien's interrogation of Herrick regarding what he told the Board and whether he signed a union authorization card coerced and interfered with Herrick's Section 7 rights guaranteed by the Act. The Respondent argues on brief that Josephine O'Brien admits that she asked Herrick whether he filed a grievance against her with the Union; that O'Brien denies that she told Herrick that he was "full of shit"; and that

[I]t is axiomatic that general questions directed to employees who are open and active union supporters are not necessarily coercive. In this regard, Herrick was a self-proclaimed 'leader' of the employee organizing at O'Brien. Yet, there is no evidence whatsoever that the conversation between Herrick and Mrs. O'Brien was intimidating or coercive. Thus, Mrs. O'Brien did not violate Section 8(a)(1) by asking Herrick whether he filed a grievance with the union. [Respondent's brief, page 45] [citations omitted.]

Josephine O'Brien is not a credible witness. Once again she lied under oath. She admitted to Counsel for General Counsel that she received a copy of the Board charge dated February 25 alleging that the Respondent discriminated against Herrick by denying him Saturday work and by denying him drilling opportunities because he supported Local 150 and engaged in other protected, concerted activity. Since there was no collective bargaining agreement with arbitration and grievance procedures, there would be no mechanism for filing a grievance against O'Brien with the Union. Eventually Josephine O'Brien conceded that in her mid-March 2003 conversation with Herrick she may have said "charge." She never conceded, however, that she told Herrick that he was "full of shit." Josephine O'Brien did admit yelling at Cooley on April 29. It appears that she has a problem controlling her temper. O'Brien asked Herrick if he signed a union authorization card and he told her that he did. He had already told Wandell that he signed a union authorization card so undoubtedly O'Brien was asking a question for which she already knew the answer. As Respondent apparently concedes on brief, it was obvious to O'Brien in mid-March 2003 that Herrick was an open and active union supporter, a "self-proclaimed 'leader' of the employee organizing at O'Brien." That still does not give Josephine O'Brien the right to ask Herrick what he told the Board, and if he signed a union authorization card. The President and majority owner of the Respondent was questioning Herrick in her office in a hostile manner. She was telling Herrick that he was "full of shit." The nature of the questions was threatening and she was seeking to obtain information from Herrick on which she might possibly take adverse action. This conversation was not casual and amicable. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). It violated the Act as alleged in paragraph V(d) of the complaint.

Paragraphs V(e)(i) and (ii) of the complaint collectively allege that Respondent by Josephine O'Brien about late March or early April 2003 at its facility threatened employees with loss of overtime and with unspecified reprisals if they selected the Union as their collective bargaining representative. General Counsel contends on brief that the Respondent violated the Act when Josephine O'Brien told Cooley that if the Union came in, the Respondent would be a different company, there would be no more overtime, and the employees would not have the same benefits and luxuries; that when an employer threatens to decrease benefits, including overtime, due to employees' union activities, that employer violates Section 8(a)(1) of the Act; and that when an employer threatens employees with unspecified loss of benefits, it violates Section 8(a)(1) of the Act. The Charging Party argues on brief that Josephine O'Brien threatened the loss of overtime and that the company would be different somehow if the Union came in; and that such open-ended non-qualified comments are unlawful because they suggest to employees interested in the Union that the company will take some unknown action against them if they choose to bring the Union in. The Respondent contends on brief that Cooley's testimony on cross-examination raised significant questions as to whether the conversation even took place in that Cooley did not recall the reason he was in Josephine O'Brien's office, contrary to his testimony on direct he testified that Josephine O'Brien talked about multiple drilling companies, and his May 12 affidavit to the Board does not refer to benefits but rather refers to the changing of liberties, which has different connotations and legal consequences; that while Josephine O'Brien recalled having a discussion with Cooley in her office concerning the Union, she denies that they discussed anything more than Cooley stating that he had been talking to the Union; and that the April 28 memorandum limiting the amount of overtime

employees could work was in response to the nearly devastating decline in business suffered by O'Brien, which justified the need to reduce employee overtime.³⁴

If Josephine O'Brien admits that she had a discussion with Cooley in her office concerning the Union, it would not appear that important that Cooley does not remember the reason he was in Josephine O'Brien's office. The fact that Cooley testified on cross-examination about Josephine O'Brien talking about multiple drilling companies does not mean that this testimony was contrary to his testimony on direct. Cooley was specifically asked about the multiple companies on cross. He was not asked about multiple companies on direct. And his direct testimony did not specifically exclude the possibility that Josephine O'Brien talked about multiple drilling companies. And finally with respect to the Respondent's arguments on brief, the fact that Cooley used the word liberties in his affidavit to the Board instead of benefits does not undermine his credibility when one considers his testimony that liberties, benefits, and privileges all mean the same to him in the involved context. Indeed on direct Cooley spoke to benefits and luxuries. Cooley operates a drill rig and has a commercial truck driver's license. It is not reasonable to expect, as the Respondent apparently argues on brief, that Cooley would appreciate that "[t]he use of the words 'liberties would change' versus the words, 'benefits would change' clearly have different connotations and legal consequences." The complaint allegation refers to loss of overtime and unspecified reprisals. Josephine O'Brien was not a credible witness. Cooley, on the other hand, impressed me as being a credible witness. His testimony is credited. The Respondent violated the Act as alleged in paragraph V(e)(i), and (ii) of the complaint.

Paragraphs V(f)(i), (ii), and (iii) of the complaint collectively allege that Respondent by Josephine O'Brien on April 29, 2003 at its facility created an impression among its employees that their union activities were under surveillance by Respondent, informed its employees that it would be futile for them to select the Union as their collective bargaining representative, and threatened employees with closure of its operations if they selected the Union as their collective bargaining representative. General Counsel contends on brief that by her own admission, Josephine O'Brien was too angry to recall much of her April 29 conversation with Herrick in her office; that in her fury about the Union, Josephine O'Brien unlawfully created the impression that employees' union activities had been surveilled when she told Herrick the exact number of Union authorization cards that had been signed by unit employees, namely nine; that when she told Herrick that even if the Union won the election, the results would not go through, she was unlawfully indicating that it was futile to select the Union; and that she unlawfully threatened to close the Respondent's facility. The Respondent contends on brief that Herrick's testimony regarding this conversation is completely absurd and should not be credited; that Josephine O'Brien "credibly denies ever stating she would shut down if the Union came in or stating she

³⁴ In note 29 at page 48 of its brief, the Respondent indicates that it is uncontroverted that between April 2002 and April 2003 O'Brien lost approximately \$1.5 million in business. While Josephine O'Brien was asked a series of questions which originally referred to April 2002 to April 2003, it is not clear, as noted above, that when she gave what she believed to be the losses suffered she was indeed referring to this period. The 2002 organizing campaign was given up. There is no indication on the record that during that campaign the Respondent was asked to leave any jobsite. By all accounts, the second campaign began in earnest in late January – early February 2003. The Respondent was asked to leave the U.S. 41 project at that time. Consequently the losses the Respondent suffered began at that time. The Respondent's assertion would mean that in a period of three months the Respondent lost one half of its annual \$3 million in gross revenues. No business records were introduced showing the decline in revenue and over what period it occurred. And Josephine O'Brien is not a credible witness.

knew how many employees had signed authorization cards (Id. at 1131, 1148: Josephine)” (Respondent’s brief page 46); and that it is uncontroverted that Josephine O’Brien only found out about the prevailing wage claim during the pendency of this hearing, making Herrick’s testimony that they discussed ‘stealing’ in connection with the prevailing wage issue not only
 5 implausible but completely impossible.

As noted above Herrick testified that at one point on April 29 he spoke with Josephine O’Brien alone in her office; that he asked O’Brien if getting fired was about the union and the card he had signed and she said “no”; and that he said that plenty of other people signed cards and O’Brien said
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that she knew that there ... [were] nine people that signed cards and she wasn’t worried if it went to an election, it wouldn’t go through anyways. She said that as a professional woman, she couldn’t afford to have the union come in. And if the union came in she’d shut down because she worked her whole life to get where she’s at and she’s not going to throw it down the drain.
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On brief the Respondent cites transcript pages 1131 and 1148 in support of its argument that Josephine O’Brien denied saying she would shut down if the Union came in or stating that she knew how many employees signed authorization cards. Josephine O’Brien testified as follows on page 1131 of the transcript:
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Q. BY MR. REVNEW: Mrs. O’Brien, there’s some testimony from Joe Herrick or he testified that sometime in January or February of 2003 you said you’d shut down the drilling department and subcontract it if the union would come in? [As noted above, the transcript actually reads “that if the union was to come, she’d end up shutting down the subcontracting” (transcript page 471)]
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A. I have never said that to anybody.
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As can be seen, Josephine O’Brien’s testimony which is cited by the Respondent on brief refers to a different conversation, and in answering the question she was saying that she never said that she would shut down the drilling department and subcontract if the union would come in. That is not what Herrick testified she told him on April 29. On April 29, according Herrick’s testimony, she told him that if the Union came in she would shut down. This is quite different from shutting down a department and subcontracting. It does not appear that Josephine specifically denied Herrick’s testimony regarding what she told him on April 29 in her office about shutting down. On page 1148 of the transcript Josephine O’Brien testified as follows:
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Q. And during Mr. Herrick’s testimony he testified that the two of you talked about the number of Union cards that had been signed, do you recall Mr. Herrick’s testimony?
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A. Yes.

Q. Did you have a discussion with Mr. Herrick concerning the signing of Union authorization cards during that discussion?
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A. No.

It is questionable whether this is a specific unequivocal denial of Herrick’s’ testimony that Josephine O’Brien on April 29 told him “that she knew that there ... [were] nine people that signed cards” As noted above, Panozzo, at the April 23 union meeting said that it looked like
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the Union had enough cards to bring it to a vote. This was the union meeting where Panozzo asked a number of questions, namely, would Josephine have to pay dues and how much, would she be able to keep her minority status, could she run the business the way she wanted to run the business, and how would hiring be affected. Josephine O'Brien testified that she did not ask Panozzo to attend a union meeting and she did not discuss with him any union activity he may have engaged in. But Josephine O'Brien is not a credible witness. It does not appear that Josephine O'Brien specifically, unequivocally denied telling Herrick "she wasn't worried if it went to an election, it wouldn't go through anyways." Herrick's April 29 conversation with Josephine O'Brien in her office was a one-on-one conversation. One of the participants, O'Brien, is not a credible witness. She does not unequivocally deny the conversation in its entirety. Indeed, she was furious, she was yelling, and she admits that she does not remember parts of the conversation. With respect to the Respondent's argument on brief that Herrick's testimony that they discussed 'stealing' in connection with the prevailing wage issue is not only implausible but completely impossible, it is noted that Josephine O'Brien first testified that that she did not remember Herrick accusing her of stealing from him. O'Brien then testified that yes she did hear him say that but she did not steal from Herrick; that she had no idea why Herrick accused her of stealing from him; and that she did not remember Herrick saying it related to the company's failure to pay him the prevailing wage. Contrast her testimony with Herrick's unequivocal testimony that when Josephine O'Brien called the union liars he "told her that she was a liar because she had stolen from me ... prevailing wage." (transcript pages 522 and 523) Herrick's testimony regarding what Josephine O'Brien said to him in her office on April 29 is credited. The Respondent violated the Act as alleged in paragraph V(f)(i), (ii), and (iii) of the complaint.

Paragraphs VI(a), (b), (c), and (d) of the complaint allege collectively that Respondent by Josephine O'Brien on April 29, 2003 at its facility unlawfully discharged Cooley and Herrick because they joined, supported or assisted the Union, and because Herrick gave testimony to the Board in the form of an affidavit. General Counsel contends on brief that on April 28 not only did Wandell post the memorandum regarding only working extra time to finish up a job but Wandell, contrary to his testimony, told Cooley and Herrick that he was cutting them down to 40 hours per week, 8 hours per day, and no overtime unless they could finish the extra work within a short period of time; that the Respondent does not monitor employees' time in the field; that as demonstrated by its treatment of Broadway, Campbell, Bassi, and Mandat, the Respondent has been extremely lax regarding employee discipline; that the Respondent discharged Cooley and Herrick because they engaged in union activities; that Cooley and Herrick attended union meetings, talked to employees about the Union on a daily basis inside the Respondent's facility and in the presence of management, wore union hats/vests in the Respondent's facility and on jobsites, and admitted to management that they had signed union authorization cards; that Wandell admitted that he told Cooley not to wear his union hat, and Josephine O'Brien admitted that she asked Herrick why he filed a charge against her; that the Respondent had no legitimate business justification for its discharge of Cooley and Herrick in that neither had ever been disciplined before, they were good employees, they were never asked for their version of the April 29 Wendy's stop, the Respondent turned a blind eye to other infractions, and the only thing that set Cooley and Herrick apart was their union activities; that once the Respondent knew that the Union had majority support, Josephine O'Brien decided to rid herself of the Union's two most active supporters; that the discharges violated Section 8(a)(3) of the Act; and that the discharge of Herrick also violated Section 8(a)(4) of the Act because it was based, in part, on his cooperation with or participation in a Board proceeding. The Charging Party argues on brief that Cooley and Herrick were discharged after their union support was confirmed and six days after a union meeting where it was indicated that the Union was going to continue picketing; that the Respondent's stated reason for terminating Cooley and Herrick is pretextual; that false statements and deviating from its past lenient disciplinary practices support an inference of employer animus; that employer animus was demonstrated by Josephine O'Brien's threat to

shut down because of the Union and her references to the Union as goons, liars, and thieves; that the Respondent has to show that it would have taken the same action against Cooley and Herrick absent their protected activity; that Cooley and Herrick did not falsify their time cards; that an employee who did falsify his time card, Campbell, was not discharged; and that given
 5 that Josephine O'Brien knew that Herrick gave a statement to the Board, and she demonstrated animus toward the organizing drive, there is also a violation of Section 8(a)(4) of the Act. The Respondent contends on brief that General Counsel cannot establish a prima facie case in that it has not been shown that the Respondent harbored anti-union animus toward either Cooley or
 10 Herrick because of their purported activities, and General Counsel failed to establish a causal connection between the Respondent's alleged animus and the decision to terminate Cooley and Herrick; that Wandell's comments to Cooley about the union hat do not constitute anti-union animus; that "[r]ather than establish anti-union animus toward Cooley and Herrick, the record evidence shows just the opposite – that O'Brien continued to treat Cooley and Herrick as a valued part of the company notwithstanding their union activity" (Respondent's brief, page 24)
 15 (emphasis in original); that O'Brien demonstrated that it would have taken the same action toward Cooley and Herrick regardless of their purported union activities; that when Wandell saw Cooley's rig near Busse Road and Oakton Street he expected that they would be doing more work that afternoon; that stopping at the involved Wendy's required that Cooley and Herrick drive nearly a mile and half out of their way, passing, as shown in Respondent's Exhibit 5, no
 20 less than 13 other fast food restaurants and numerous gas stations in the process; that Cooley and Herrick went to this out of the way Wendy's, where it would be unlikely anyone from O'Brien would see them, in order to kill time before heading back to the office; that even if O'Brien was mistaken about the exact length of Cooley and Herrick's lunch stop (which it is not), such a mistake would not convert the otherwise lawful termination of Cooley and Herrick into a
 25 discriminatorily motivated discharge³⁵; that protected activities do not insulate employees from legitimate discipline; that General Counsel failed to show that O'Brien treated Cooley and Herrick in a disparate manner; that the situation involving Campbell is completely different from the situation involving Cooley and Herrick because Campbell immediately took responsibility and admitted he wrote the wrong time on his card when first confronted by Wandell; and that
 30 General Counsel failed to establish that O'Brien harbored any animus toward Herrick because he provided a statement to the Board or a causal connection between Herrick providing the statement and his eventual termination.

As set forth in *Wright Line, Inc.* 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st
 35 Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U. S. 393 (1983),

We shall henceforth employ the following causation test in all cases alleging violation of
 40 Section 8(a)(3) or 8(a)(1) turning on employer motivation. First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that

³⁵ In note 23 on page 32 of its brief the Respondent argues that it was a mistake to receive into evidence the Decisions of the Illinois Department of Economic Security, General Counsel Exhibits 44 and 45. The Respondent moves to strike these two exhibits and all related testimony
 45 from the record. The Board receives and considers decisions in State unemployment compensation proceedings, but does not give the decisions controlling weight on unfair labor practice issues. *Whitesville Mill Service Co.*, 307 NLRB 937, 945 fn 6 (1992). Accordingly, the Respondent's motion is denied. The Respondent argues that while the Nextel bill referred to in the Decisions indicates that Wandell called Josephine O'Brien at 1:18 p.m. rather than
 50 approximately 1:05 p.m. as Wandell had reported, Wandell testified that he based his observations on the clock in the truck and not the clock on his Nextel phone.

protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Footnote omitted]

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In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

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Cooley engaged in union activity and the Respondent knew it. Cooley and Mandat both testified that Wandell asked Cooley to not park a Blazer he was driving in a space near the Respondent's building. Wandell had asked Huffman not to park his truck, which had an obscene bumper sticker, in a parking place on Respondent's lot facing a day care center. Cooley told Wandell that the Blazer with the two Local 150 union stickers was not his vehicle but rather he borrowed it and the owner was a member of Local 150. When called by Counsel for General Counsel, Wandell testified that he never asked Cooley not to park "[h]is personal vehicle" (transcript page 984) in a parking place near O'Brien's facility. When called by the Respondent Wandell testified that he never had a conversation with Cooley about the way Cooley parked his truck in the O'Brien parking lot; and that he never saw a truck in the parking lot "such [that] the bed was toward the building with Local 150 stickers in the window" (transcript page 1313). A Blazer is a sport utility vehicle. As such it does not have an open bed like a pickup. The testimony of Cooley and Mandat is credited. Wandell's denials were not specific and unequivocal. On the one hand, the fact that Cooley drove this borrowed truck does not demonstrate that he engaged in union activity up to the time of his conversation with Wandell. On the other hand, Wandell's testimony shows that he did not want to admit that he made an issue of where Cooley parked a vehicle, which did not have obscene bumper stickers but did have Local 150 bumper stickers on one of its windows. The fact that Cooley, after telling Wandell that the owner was a member of Local 150, continued to park the vehicle whenever possible where Wandell asked him not to park demonstrated to Wandell that, notwithstanding his objection to the vehicle, Cooley was willing to take a stand.

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On February 3 Josephine O'Brien asked Cooley if he was going to attend a union meeting, and he told her that he had heard about the meeting, if he could get his hands on a vehicle, he would like to go to get some information, he wanted to help his family, and improve his situation.

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Both Cooley and Mandat testified that Wandell made an issue of, as here pertinent, Cooley wearing a union hat. Mandat, a current employee of the Respondent, testified that when Wandell spoke to them, Wandell's tone was angry. Mandat's specific recall trumps Wandell's testimony that he did not recall speaking to Mandat. Wandell's testimony is not credited. Cooley testified that Mandat was with him, and Mandat testified that Cooley was with him. Their testimony is credited. They corroborated each other with respect to what Wandell did. Wandell's testimony that it was a one-on-one conversation was nothing more than an attempt on his part to eliminate the possibility of corroboration. And the Respondent's portrayal of this conversation as lighthearted is belied by the fact that the involved employees stopped wearing union hats after Wandell made them an issue.

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And finally Josephine O'Brien did not credibly deny that Cooley told her that he had signed a union authorization card.

Herrick engaged in union activity and the Respondent knew it. On February 21 Herrick told Wandell that he was going to the Labor Board to give a statement. For the reasons, which have and will be given, Wandell is not a credible witness. With respect to this incident, Herrick testified that he called Wandell on February 21. Wandell testified that on February 1 (not February 21) he did not have a telephone conversation with Herrick where Herrick told him that he was going to the National Labor Relations Board to provide a statement. After it was pointed out by General Counsel that this was not the testimony of Herrick, Wandell testified "[n]o I did not have that conversation with him," but no attempt was made to reconcile the different dates. If this conversation occurred on February 21, then one could claim that he did not have the conversation on February 1. But this is not a specific, unequivocal denial. Wandell's testimony on this point is not credited. Herrick's testimony is credited.

Josephine O'Brien admits that she received the above-described February 25 amended charge, which refers to allegations that Herrick, made against the Respondent. Indeed Josephine O'Brien made an issue of the allegations about Herrick in the charge, telling him that he was "full of shit." Josephine O'Brien then took it a step further and asked Herrick if he signed a union authorization card, and he told her that he did. Like Wandell, Josephine O'Brien, by testifying that she did not recall anyone else being present, attempted to eliminate the possibility of corroboration. Herrick and Cooley's testimony regarding this conversation is credited. Josephine O'Brien is not a credible witness. Minor discrepancies in the testimony of Herrick and Cooley are understandable. When the President and owner (98%) of the company for which Herrick works is questioning him in her office about making a Federal charge against her, telling him he is "full of shit," and unlawfully asking him if signed a union authorization card, it is understandable how Herrick would not have kept track of where Cooley was standing during the conversation. In a situation where one feels threatened verbally or otherwise, it is understandable how they might experience tunnel vision, focusing only on the source of the threatening conduct.

In the middle of March 2003 when he was wearing a union hat in the lab to get coffee, lab technician Eisenhut called Herrick "Union Joe" in the presence of Josephine O'Brien and Pilipiszyn. Eisenhut did not testify to deny this. Josephine O'Brien is not a credible witness. And Pilipiszyn only testified that he did not see the union hat. Herrick's testimony is credited.

In March 2003 Herrick wore a union hat and Wandell asked him why he was for the Union. Herrick then told Wandell that he "signed a union [authorization] card because ... [he] was tired of how unfair everything was ran [sic] around there and the wages and raise that ... [he] was receiving" (transcript page 475). Wandell's testimony that he never saw Herrick wear any union paraphernalia, he never saw Herrick wearing a union hat between January and April 2003, and that he never asked Herrick why he was for the Union is not credited. Wandell is not a credible witness. Herrick's testimony regarding this conversation is credited.³⁶

Herrick testified that he and Eisenhut discussed the Union in March 2003 in the presence of Wandell. Eisenhut did not testify to deny this. Wandell's testimony, namely that in March 2003 he did not see Cooley and Herrick speaking in O'Brien's garage to Panozzo and

³⁶ Interestingly, another witness called by the Respondent, Huffman, testified that he was not sure if he saw Herrick wearing a union hat, notwithstanding Huffman's March 21 affidavit to the Board which indicates that he did see Herrick wearing a union hat at work. Huffman explained under oath that the Board agent who took the statement "might have wrote it down wrong." (transcript page 1085) Huffman did not deny that he signed the affidavit.

Eisenhut is not a specific, unequivocal denial of Herrick's testimony. Wandell is not a credible witness. Herrick's testimony is credited.

On April 29 Herrick wore a vest at the jobsite, which had writing on it about "Local 150" and "Support Fair Wage." Wandell was within 5 feet of Herrick at the jobsite that day, and Wandell was able to describe what Herrick was wearing, including a safety vest. Wandell did not concede that the vest had writing on it. Wandell was able to get the employees to stop wearing union hats after he made it an issue with them. On April 29 Wandell was faced with the fact that although the employees were no longer wearing union hats at the facility, Herrick was wearing a vest at a jobsite on a street in downtown Chicago which supported the Union and a fair wage. In other words, Herrick was making a public statement that O'Brien was not paying its employees a fair wage. Cooley and Herrick testified that Herrick was wearing the vest with the writing on it supporting the Union and a fair wage. Wandell testified that he did not see it. Wandell is not a credible witness. The testimony of Cooley and Herrick is credited. In my opinion it is reasonable to conclude that if Wandell was 5 feet away from Herrick and if Wandell saw the safety vest, as he admits, than he would have seen the writing on the vest. Perhaps Wandell, unlike the union hats, did not patently make an issue out of the vest at the jobsite because at some point after the charge was filed against O'Brien it was advised with respect what could and could not be said. Perhaps the filing of the charge made him, if not Josephine O'Brien with her "full of shit" statement, more circumspect.

With respect to animus, it is noted that Josephine O'Brien called the Union liars, goons, and thieves, she was upset with the fact that the Union was picketing and O'Brien was asked to leave jobsites, she told Herrick that he was "full of shit," and she engaged in the above-described unlawful conduct. There is no question but that there is anti-union animus on the part of O'Brien.

O'Brien took adverse action against Cooley and Herrick (a) 6 days after a union meeting at which the number of cards already signed was discussed, and the Union indicated that it was going to continue picketing, which picketing was costing O'Brien money, and (b) within about 3 hours after Wandell saw Herrick wearing a vest on a public street in downtown Chicago declaring that O'Brien did not pay its employees a fair wage. General Counsel has made a prima facie case.

Has the Respondent shown that the same action would have taken place even in the absence of Cooley and Herrick's protected conduct? Josephine O'Brien testified that she had no personal knowledge of the exact times involved with respect to the April 29 stop at Wendy's. She testified that she relied solely on what Wandell told her. Can we rely on Wandell's testimony about April 29?

Wandell is not a credible witness. He did not tell the truth, the whole truth, and nothing but the truth under oath about (a) the Union representative introducing himself to Wandell in 2002 at the Wacker Drive jobsite, (b) the Chevrolet Blazer with the union stickers, (c) telling Herrick on February 6 that he could borrow a company vehicle if he did not use it to go to a union meeting, (d) Herrick telling him on February 21 that he was going to the Labor Board to give a statement, (e) speaking to Mandat about wearing a union hat, (f) never seeing Herrick wearing a union hat and asking Herrick why he was for the Union, (g) Herrick discussing the Union with Eisenhut in his presence, (h) not believing that he had a conversation with Cooley and Herrick on April 28 about not working over 8 hours a day unless there was only one hole to

finish and the job was not going to take that long,³⁷ (i) Cooley and Herrick were not giving their best efforts on the 39th and Cottage job and perhaps he said something to them that they were not doing their best effort on the job,³⁸ (j) his above-described memorandum regarding what happened on April 29 only indicates that Cooley said Herrick wanted to stop but, according to Wandell's testimony, Herrick also said that it was Cooley's idea to stop, (k) Herrick not telephoning him on April 30,³⁹ and (l) never reporting to Josephine O'Brien that he saw Huffman napping.⁴⁰ I would not credit the testimony of Wandell unless and until it was corroborated by a credible witness or a reliable document. Apparently there is a document which indicates that Wandell used his Nextel phone to call a telephone number listed for O'Brien at 1:18 p.m. on

³⁷ Wandell did not want to admit to this conversation because (1) it would give credence to Cooley's and Herrick's testimony that they did not have time, with this limitation, to start another hole in the area they were drilling without going well over the 8 hour limit, and (2) it would undermine his testimony that he did not expect to see Cooley and Herrick at Oakton Street and Busse Road when he did. Seeing that Cooley and Herrick arrived at and punched in at 6:15 a.m. on April 29, one would have expected, after telling them not to work over 8 hours unless it was necessary to finish up a drill, them to return to the facility about 2 p.m. so that they could complete their paperwork and punch out at 2:15 p.m. Since the intersection of Oakton Street and Busse Road is about 20 minutes from O'Brien's facility, there would not be anything unusual about seeing Cooley and Herrick in that area when they were there when one considers the limitation on hours discussed on April 28. Originally Wandell testified that Cooley and Herrick were working at 39th and Cottage Grove on April 28, he left early to go to Little League practice, and he did not recall telling Cooley and Herrick that they should not work more than 8 hours a day. After General Counsel pointed out that Cooley and Herrick on April 28 went to get Herrick's commercial driver's license, and after General Counsel demonstrated that the time cards of Cooley and Herrick showed that they left the facility in the afternoon to go home before he left for Little League, Wandell conceded that they left first. Wandell maintained, however, that he did not see Cooley or Herrick on April 28. Interestingly on April 29 when Cooley brought up the 8-hour limitation, Wandell admits that he did not tell Cooley that there was no 8-hour limitation.

³⁸ The only evidence on this point is Wandell's testimony. There is no documentation. Indeed there is no documentation that Cooley or Herrick were ever disciplined in any way.

³⁹ As noted above, on April 30 Herrick asked O'Brien if they were in Wendy's for half an hour what were the times, O'Brien said that she did not know the times, Wandell knew them, and if he wanted to, he could talk to Wandell when he came in. Herrick then went to Wandell's office and telephoned Wandell and asked him if they were at Wendy's for half an hour what were the times. Wandell said that they were at Wendy's from 1:20 p.m. to 1:45 p.m. Herrick asked Wandell how come he said 30 minutes on April 29 and now he was saying 25 minutes. Wandell said those were the times he had. Herrick then went back to the lab and spoke to Josephine O'Brien, telling her that today Wandell said it was 25 minutes and yesterday Wandell said that it was 30 minutes, and he asked O'Brien about Huffman, Bassi, and Campbell and she, as did Wandell during the April 30 telephone conversation, said they had nothing to do with him. As noted above, Josephine O'Brien testified that she believed that Herrick went into Wandell's office to telephone Wandell but she did not think that she spoke with Herrick again that morning after he telephoned Wandell. Herrick's very specific testimony is credited. Josephine O'Brien's equivocation is not credited. Herrick did talk with Wandell over the telephone that morning and he subsequently spoke with Josephine O'Brien.

⁴⁰ Josephine O'Brien testified that Wandell told her that Huffman was sleeping on the job but it was during his half hour for lunch. Interestingly, Wandell testified that he did not subsequently check Huffman's time card to see if he put "N/L" or "no lunch" on it.

April 29. This is the only objective document which is related to the events of April 29.⁴¹ It was not introduced into evidence in this proceeding. In the situation at hand, neither Wandell nor Josephine O'Brien is a credible witness. I cannot rely on the testimony of either regarding what may have been said during this telephone conversation. Indeed without more, I cannot be sure where Wandell was when he made this telephone call. Wandell did testify that he was 750 feet away from the rig when it was parked by Wendy's. That is the equivalent of the combined length of two and one half football fields (excluding the end zones). At that distance on a busy street with 18 wheel tractor trailers (semis) moving about it is unlikely that Wandell would have been able to see whether Herrick had a paper bag in his hand when he got into the truck. If as alleged by the Respondent on brief, Cooley and Herrick were killing time in Wendy's, would it not follow that Herrick would have eaten his meal while they were killing time. The fact that Herrick and Cooley testified credibly that Herrick had a bag, and he consumed his hamburger and drink in the truck on the way back to O'Brien's facility indicates that they were in Wendy's only as long as necessary.⁴²

Josephine O'Brien did not specifically deny Cooley's testimony that she told him on April 29 that he did not have any company loyalty. According to Webster's New World Dictionary, Third College Edition, (a) loyalty means the quality, state, or instance of being loyal; faithfulness or faithful adherence to a person, government, cause, duty, and (b) a loyalist is (1) a person who is loyal; especially one who supports the country's established government during times of revolt, and (2) in the American Revolution, a colonist who was loyal to the British government. Josephine O'Brien fully appreciated that she and her company were under siege. Six days before she told Cooley that he did not have any company loyalty, the Union held a meeting with O'Brien's employees at which it was indicated that while there were union authorization cards signed, the Union was going to continue its effort to get union authorization cards, and also continue its picketing. Josephine O'Brien had to wonder if the Union was trying to drive her out of business. The day before Cooley's and Herrick's discharge the Respondent, apparently for the first time, posted a notice advising the involved employees that, with a limited exception, overtime was not available, and this was done to avoid layoffs. Cooley and Herrick were not supporting Josephine O'Brien. Cooley and Herrick were supporting her declared enemy, the Union, who she described as the goons, liars, and thieves. This is why she told Cooley he had no company loyalty. Herrick, Cooley's assistant and in Cooley's presence on a public street in downtown Chicago, was openly declaring his affiliation with her enemy and he was, in effect, declaring that O'Brien was not paying its employees a fair wage. So, in addition to the motivation already described above – including the fact that Herrick gave a statement to the Board, Josephine O'Brien herself was supplying a connection between her action and the motivation for her action.

⁴¹ There is another document, namely the memorandum written by Wandell describing from his point of view the events of April 29.

⁴² The Respondent has not shown that Cooley and Herrick were stealing time. When Campbell was caught claiming time he did not work, Wandell did not discipline him. Wandell claims this is because Campbell immediately admitted it. But Campbell has passed away so we do not have anyone's word on that point other than the work of Wandell, who is not credible. Even approaching this situation from Respondent's point of view, there is no credible explanation for disparate treatment. The credible evidence of record shows that the Campbell situation was raised to management both on April 29 and April 30. Wandell and Josephine O'Brien are not credible witnesses. Both knew exactly what was going on. Both knew that even taking the tack they took involved disparate treatment. Neither cared because it really did not matter in that Cooley and Herrick, unlike Campbell, did not attempt to steal time so there was no need to justify treating them differently than Campbell.

The Respondent has not shown that it would have discharged Cooley and Herrick in the absence of their protected conduct. The testimony of Cooley and Herrick regarding the stop at Wendy's on April 29 is credited. The testimony of Wandell and Josephine O'Brien regarding this stop is not credited.⁴³ The Respondent violated Section 8(a)(1) and (3) when it discharged Cooley and Herrick, and it violated Section 8(a)(1) and (4) when it discharged Herrick. The Respondent violated the Act as alleged in paragraphs VI(a), (b), (c), and (d) of the complaint.

Paragraphs VII(a), (b), (c), and (d) of the complaint allege collectively that a majority of the employees in the unit,⁴⁴ about March 28 designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, the above-described violations are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employee sentiments having been expressed by authorization cards would on balance, be protected better by issuance of a bargaining order than by traditional

⁴³ Certain of the arguments made by the Respondent on brief warrant comment. As noted above, the Respondent argues that stopping at the involved Wendy's required that Cooley and Herrick drive nearly a mile and half out of their way, passing, as shown in Respondent's Exhibit 5, no less than 13 other fast food restaurants and numerous gas stations in the process. Contrary to this argument, Cooley and Herrick did not pass the 13 other fast food restaurants on their way to the involved Wendy's. They would have passed those other establishments if they had taken a different route. Herrick and Cooley went four blocks south on Busse Road when they turned from Oakton Street. The Respondent estimates the one-way distance to be three quarters of a mile. This is three times around a 440-yard running track, which is hardly something to make an issue out of. But then the Respondent argues that Cooley and Herrick went to this "out of the way" Wendy's, where it would be unlikely anyone from O'Brien would see them, in order to kill time before heading back to the office. As concluded above, Cooley and Herrick were not killing time. As far as the going to an establishment where it would be unlikely for anyone from O'Brien to see them, it is noted that Herrick parked the rig just off Busse Rd. (75 feet from Busse Road on Jarvis Street) in plain sight. Busse Road appears to be one of the possible major routes that one could take going back to O'Brien's facility. Indeed Wandell was taking this route on April 29. Cooley and Herrick were not hiding from anyone. They stopped to use the restroom and Herrick got something to consume in the truck on the way back to O'Brien's facility. Finally the Respondent argues that even if O'Brien was mistaken about the exact length of Cooley's and Herrick's stop (which it is not), such a mistake would not convert the otherwise lawful termination of Cooley and Herrick into a discriminatorily motivated discharge. It appears that the Respondent is arguing that it acted in good faith. Nothing could be further from the truth. The Respondent did not act in a mistaken but good faith belief. More than once Josephine O'Brien admitted that she did not know the times involved. Yet she never asked Cooley or Herrick. She did not because it did not really matter. Josephine O'Brien once again gave in to her anger as she did when she questioned Herrick about the Board charge. On April 29 she again was angry about protected activity. She was angry because Cooley and Herrick, in her view, chose the Union over O'Brien, she decided that they had no company loyalty, and she was going to impose the ultimate economic punishment - they were going to lose their jobs. Josephine O'Brien was not acting in good faith.

⁴⁴ The unit consists of the following:

All full-time and regular part-time drillers, driller's helpers, and field technicians employed by the Employer at its facility currently located at 1235 E. Davis Street, Arlington Heights, Illinois; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

remedies alone. General Counsel contends on brief that conduct of the type involved here, which was engaged in by the President and owner (98 percent) of the Respondent, which involves a small unit, and which was initiated immediately following the onset of union organizing has a propensity to undermine majority strength and impede the election process; that 12 of the 15 involved employees signed union authorization cards; and that there is no evidence that any of the signers were coerced, threatened, or promised anything to sign. The Charging Party argues on brief that where an employer threatens to close its facility, interrogates employees about their support for the union, discriminatorily discharges employees, and refuses to recognize and bargain with the union, the Board has found that a bargaining order is appropriate, *Transportation Repair & Service*, 328 NLRB 107 (1999); and that here the Union had the majority support, O'Brien's unfair labor practices have the tendency to undermine majority strength and impede the election process, and the possibility of erasing past unfair labor practices is slight, *Davis Supermarkets*, 2 F.3d 1162 (D.C. Cir. 1993). The Respondent contends on brief that assuming arguendo that O'Brien committed unfair labor practices, this case should be analyzed as a "Category II" case under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) to determine whether a bargaining order is warranted; that under Category II if the Union had majority support at some point, and the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight, then employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order; that here the Union did not have majority status given the representations Cooley and Herrick made to the bargaining unit employees; that although the Union introduced 12 signed authorization cards, many of the cards are tainted by the Union's coercion and misrepresentations to employees⁴⁵; that the Union informed Cooley and Herrick, and Cooley and Herrick in turn informed six other employees that if a majority of the employees signed cards, there would be an election; that the six employees⁴⁶ clearly believed that the sole purpose for signing the card was for an election to be held; that unambiguous cards, such as the instant cards, are properly invalidated because of misrepresentations concerning their purpose when employees are told, or intentionally led to believe that the sole purpose of the card is to secure an election, *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963); that a bargaining order is not warranted in view of the extent of dissemination among the work force, the size of the unit, the number of employees directly affected by the violation, and the identity of the perpetrator, *FJN Mfg.*, 305 NLRB 656, 657 (1991); that while Josephine O'Brien is the President of the company, the alleged unlawful conduct was not widely disseminated and it did not involve a significant number of employees; that given the economic harm that the Union has imposed upon employees with its ambulatory and recognition picketing, traditional remedies better protect employees' Section 7 rights; and that

The request for a bargaining order should be denied because traditional remedies will adequately 'cleanse' the effects of the alleged unfair labor practices. For

⁴⁵ Additionally the Respondent argues that Huffman's and Panozzo's cards should be discarded because the date on the former was not validated, and Panozzo felt intimidated into signing his card in that a union representative squared off on him. When he was called as a witness by the Respondent, Huffman testified that he signed the involved card. August, who witnessed Huffman signing testified that Huffman signed the card on or about February 8. His testimony is credited. In these circumstances that card will not be discarded. Panozzo, who was called as a witness by the Respondent testified that he signed the union authorization card of his own free will, he was not threatened to sign the card, he was not promised anything, he was not offered anything, and prior to signing the card the Union never talked about getting a vote at O'Brien. Panozzo's card will not be discarded.

⁴⁶ Huffman, Bassi, Campbell, Bell, Pinky Patel, and Panozzo.

instance, in the event Cooley and Herrick are reinstated, the Union will have 'two poster children' to illustrate to O'Brien employees that the Union can successfully fight O'Brien's allegedly egregious actions and get results. If anything, an award of reinstatement and back pay to Herrick and Cooley will provide the Union with a campaign advantage, or at the very least the reasonable certainty of two of the eight necessary "yes" votes to win and NLRB sponsored election. Further, to the extent additional violations are found that require a traditional Board posting, employees will be advised that O'Brien is prohibited from engaging in certain conduct that interferes with their Section 7 rights.
[Respondent's brief. page 73]

The burden of proof regarding whether Eisenhut is a supervisor is on the party claiming that he is a supervisor. Since it was not demonstrated that Eisenhut is a supervisor as that term is defined by the Act, and since he shares a community of interest with those in the unit, he will be included in the unit. Consequently there are 15 employees in the unit.

By March 28 nine employees had signed union authorization cards. Subsequently three additional cards were signed. As noted above, the Respondent claims that six of the card signers were told that if a majority of the employees signed cards, there would be an election. One of the six named by the Respondent, Panozzo, testified, when called as a witness by the Respondent, that prior to his signing the card the Union never talked about getting a vote at O'Brien. The Respondent called two other employees, namely Broadway and Huffman. Broadway did not sign a card. And Huffman never testified about what he may have been told before signing his authorization card. While the Respondent claims that certain employees were told that the sole purpose of the card was to secure an election, the record does not support such an assertion. The involved card explicitly designates the Union as the signer's bargaining representative. A majority of the employees in the involved unit signed valid authorization cards.

As noted above, in determining whether a bargaining order is warranted, consideration is given to "the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice. *Michigan Expediting Service*, 282 NLRB 210, 211 (1986). On the one hand, while Josephine O'Brien is the President and owner of the company, there is no showing that her unlawful conduct was either widely disseminated or involved a significant number of employees. The Respondent did not hold any meetings with all of its employees. Josephine O'Brien's unlawful conduct was directed at a total of three (20 percent) of the 15 employees in the unit. There was no showing that the unlawful conduct was disseminated to the other employees in the unit, some of who spend a lot of time in the field. While there were two "hallmark" violations with the unlawful discharges of Cooley and Herrick, the only other hallmark violation was with Herrick when he was being terminated. There is no showing that he disseminated Josephine O'Brien's April 29 threat to shut down to other employees. Additionally three union authorization cards were obtained after Cooley and Herrick were terminated. On the other hand, however, the unit is small. There is a great likelihood of a recurrence of unfair labor practices in that Josephine O'Brien, the President and owner of the Respondent, has more than once demonstrated that she has a problem controlling her anger. Josephine O'Brien was the one who committed the Section 8(a)(1), 8(a)(1) and (3), and 8(a)(1) and (4) violations. To go after an employee because he avails himself of the offices of the Board should cause particular concern. Josephine O'Brien's explanation under oath is nothing more than an incredible post hoc rationalization. Considering her position, employees would necessarily view her unlawful actions as being reflections of company policy. While there may presently be a question of the extent of dissemination of the unlawful conduct, once a decision is issued and the notice is posted there is a great likelihood that all of the Respondent's employees will be aware of what occurred. A cease and desist is not an admission and a promise not to repeat the conduct. And

the “WE WILL NOT” language in the notice, with Josephine O’Brien’s temper, could be viewed as just words on paper. In these circumstances, it is highly unlikely that traditional remedies, including the posting of a cease-and-desist notice, could create an atmosphere in which a free and fair election could be held. The fact that Cooley and Herrick would be reinstated, “after a significant passage of time, is not likely to give current employees any confidence that they can avoid retaliation if they campaign for or vote for the Union.” *Transportation Repair & Service*, 328 NLRB 107, 114 (1999). On balance, it is my opinion that the issuance of a bargaining order is warranted.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) Interrogating employees about their union activities.

(b) Creating an impression among its employees that their union activities were under surveillance by Respondent.

(c) Interrogating employees about their union activities and participation in the Board’s investigation of the instant case.

(d) Threatening employees with loss of overtime if they selected the Union as their collective bargaining representative.

(e) Threatening employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(f) Informing employees that it would be futile for them to select the Union as their collective bargaining representative.

(g) threatening employees with closure of its operations if they selected the Union as their collective bargaining representative.

4. The Respondent violated Section 8(a)(1 and (3) of the Act by discharging Jason Cooley and Joe Herrick because they joined, supported, and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities.

5. The Respondent violated Section 8(a)(1) and (4) of the Act by discharging Joe Herrick because he gave testimony to the Board in the form of an affidavit.

6. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drillers, driller’s helpers, and field technicians employed by the Employer at its facility currently located at 1235 E. Davis Street, Arlington Heights, Illinois; but excluding office clerical employees, professional employees, guards and

supervisors as defined in the Act.

7. Since on or about March 28, 2003, and at all material times thereafter, the Union represented a majority of the employees in the above appropriate unit, and has been the exclusive representative of all the employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; and the Respondent was on that date, and has been since, legally obligated to recognize and bargain with the Union as such.

8. The above-described labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

9. Respondent has not committed any other unfair labor practices alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁷

ORDER

The Respondent, O'Brien & Associates, Inc, of Arlington Heights, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Interrogating employees about their union activities.

(b) Creating an impression among its employees that their union activities were under surveillance by Respondent.

(c) Interrogating employees about their union activities and participation in the Board's investigation of the instant case.

(d) Threatening employees with loss of overtime if they selected the Union as their collective bargaining representative.

(e) Threatening employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(f) Informing employees that it would be futile for them to select the Union as their collective bargaining representative.

(g) threatening employees with closure of its operations if they selected the Union as their collective bargaining representative.

(h) Unlawfully discharging Jason Cooley and Joe Herrick because they joined, supported, and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities.

(i) Unlawfully discharging Joe Herrick because he gave testimony to the Board in the form of an affidavit.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jason Cooley and Joe Herrick full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jason Cooley and Joe Herrick whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) On request, bargain with the Union as the exclusive representative of the employees

in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

5 All full-time and regular part-time drillers, driller's helpers, and field technicians employed by the Employer at its facility currently located at 1235 E. Davis Street, Arlington Heights, Illinois; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

10 (f) Within 14 days after service by the Region, post at its facility in Arlington Heights, Illinois copies of the attached notice marked "Appendix."⁴⁸ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2003.

20 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

25 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

30 John H. West
Administrative Law Judge

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50 ⁴⁸ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has
ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15 Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

20 WE WILL NOT interrogate you about your union activities.

WE WILL NOT create an impression among you that your union activities are under surveillance
by us.

25 WE WILL NOT interrogate you about your union activities and participation in a National Labor
Relations Board investigation.

30 WE WILL NOT threaten you with loss of overtime if you select the INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO as your collective bargaining
representative.

WE WILL NOT threaten you with unspecified reprisals if you select the INTERNATIONAL
UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO as your collective
bargaining representative.

35 WE WILL NOT inform you that it would be futile for you to select the INTERNATIONAL UNION
OF OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO as your collective bargaining
representative.

40 WE WILL NOT threaten you with closure of your operations if you select the INTERNATIONAL
UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO as your collective
bargaining representative.

45 WE WILL NOT unlawfully discharge you because you join, support, and assist the
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, AFL-CIO,
and engage in concerted activities, and to discourage you from engaging in these activities.

WE WILL NOT unlawfully discharge you because you give testimony to the National Labor
Relations Board in the form of an affidavit.

50 WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the
exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time drillers, driller's helpers, and field technicians employed by the Employer at its facility currently located at 1235 E. Davis Street, Arlington Heights, Illinois; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL within 14 days from the date of this Order, offer Jason Cooley and Joe Herrick full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jason Cooley and Joe Herrick whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jason Cooley and Joe Herrick, and WE WILL within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

O'Brien & Associates, Inc.

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

200 West Adams Street, Suite 800, Chicago, IL 60606-5208

(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.